

November 13th, 1758.

# Additional Memorial

FOR

JAMES Earl of Morton, Defender,

AGAINST

Alexander Earl of Galloway, John Traill of Westness,  
and others, Proprietors of Lands in the Islands of  
Orkney, Pursuers.

THE enormous Bulk of the Papers, which are already printed in this Cause, would have prevented the Defender from adding to the Trouble of the Court by this additional Paper, had not the Pursuers, in the Introduction to their Memorial, entered into a Detail, altogether unconnected with the Merits of the Question, but calculated to give the Court unfavourable Impressions with regard to the Defender and his Predecessors, and evidently meant as a publick Attack upon the Defender himself. The Defender is perswaded, that he might safely have left these Insinuations without any Answer, and treated them with that Contempt which they deserve; he has chosen, however, to detect the Fallacies, and remove the artful Colourings which are to be met with in the Pursuers Memorial, and, particularly, in their preliminary Discourse, that, wherever that Paper may hereafter chance to be carried, it may not be unattended with a proper Refutation.

The Tendency of the Introduction to the Pursuers Memorial, is, to impress your Lordships with a Belief, that the Defender's Predecessor obtained from the Crown the original Wadset of the Islands of Orkney and Zetland in 1643, not only without any onerous Cause, but after having been loaded, in other Respects, with the Bounty of the Crown; that the Wadset-sum was thereafter fully paid, and the Right voluntarily renounced; that James Earl of Morton obtained the repeated Recommendations of the Parliament

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of Scotland in 1693 and 1702, and also the Act 1707, by Means of false Averments; and the Pursuers farther insinuate, though they do not venture to speak it out, that the Defender himself lately imposed upon the Crown and Parliament in 1742, when he obtained a Discharge of the Right of redeeming these Islands.

None of these Alledgeances, supposing they were true, could at all enter into your Lordships Consideration in the present Issue; which is simply this, Whether the Weights in Orkney and Zetland have been increased or not? If the Crown had unnecessarily, or improperly, made a Gift of these Islands to the Defender, if his Majesty had even been induced to this Measure by false Averments; that could afford no Defence to the Pursuers with regard to the Rents or Feu-duties payable by them, because they have no Title to plead in the Right of the Crown.

But every Article of these Insinuations is groundless.—Against the Onerosity of the Wadset 1643, the Pursuers have offered no Evidence but what is frivolous; they take hold of the Form of the Wadset-right, and pretend that it does not bear that the King owed the Earl any Money, or had received any from him. And, 2dly, They affirm, that the Earl was in no Condition of making so great a Loan to the King, but, on the contrary, had been long supported by the Bounty of the Crown.

Onerosity of  
the Wadset  
1643.

But the Contract of Wadset affords no Evidence or Presumption, that it was granted without an onerous Cause. It was not the usual Form of Wadset-rights at that time, to narrate, that the Disponer had received the Redemption-money as the Value of the Right; the Prohibition of Interest, by the Canon Law, had introduced a Form of granting Infeftments of Annualrent, without relation to a principal Sum, and of executing Contracts of Wadset without ascertaining the Sum paid, any other Way than by the Clause of Reversion; and that Form continued, long after the Cause of it ceased. But the Onerosity of this Wadset is clearly proved by the Clause of Reversion, and by other Clauses; it bears, that his Majesty, “ had  
“ sold, annalzed, and disponed the Earldom of Orkney and Lord-  
“ ship of Zetland,” and they are declared redeemable only, “ on  
“ Payment or Consignation of 30,000 *l. Sterling*, in Gold or Silver,  
“ haill together in one Sum, at any Term of *Whitsunday* or *Mar-*  
“ *tinmas*, &c.” The Clause of Reversion is, in all Respects, conceived in as strict Terms as appears to have been used in any other Right of that Kind, granted for full Value; so that there is no Pre-  
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text to argue from the Form of this Deed, that the Earl of *Morton* had not advanced the Sum for Security of which it was granted.

And, indeed when, in the 1668, the Resolution was unjustly taken, to deprive the Family of *Morton* of this Right, it was never once alledged, that the Wadset had been granted without an onerous Cause ; an Objection strictly legal, viz. that no Dissolution in Parliament had preceded the Grant, was alone laid hold of ; but the Justice of the Debt was acknowledged, and Payment promised, tho' the Method, which was taken to pay it, was elusory and unjust. For Proof of this, the Defender refers to a Letter on Record, from the Lords of the Treasury in *Scotland*, to the Secretary of State, dated 5th September 1668. This Letter mentions the Scheme of recovering to the Crown the Possession of *Orkney* and *Zetland* ; and, as a Step to this, narrates a Decreet obtained against Lord *Morton* for 12,000 *l.* as the pretended Value of a Ship which Lord *Morton* was said to have seized, though belonging as Wreck to the King ; but the Letter contains no Insinuation, as if the 30,000 *l.* was not really due, though the Subject and Tendency of the Letter must have suggested an Observation of that sort, had it been true. The Words of the Letter are : “ Which Day, my Lord, after Decreet recovered against my Lord *Morton* for 12,000 *Sterling*, the Value of that Ship and Loading, which belonged to the King, and he had seized upon, our next Care was, how Payment might be recovered, or, at least, how the King might come to the Possession of *Orkney* and *Zetland*, by paying the Money upon which it was redeemable, this Sum being allowed in the first End ; and therefore, we took my Lord Advocate's Opinion of my Lord *Morton*'s Right, which you will find pretty clear, that it is not according to Law, and may be reduced, if the King please, &c.”

The Evidence of the Onerosity of the original Wadset, arising from this Letter, and several others on Record, upon the same Subject, from the Lords of the Treasury, is the more conclusive, that the Nature of the Transaction 1643, must, at that time, have been recent in the Memory of many who were then alive ; for the Contract of Wadset 1643, is subscribed by no less than fifteen of the Commissioners of the Treasury and Exchequer at the time ; and, had the Debt been without Foundation, it is impossible to doubt, that this would have been over and over insisted upon, at a time when it was resolved to resume the Possession of *Orkney* and *Zetland*,  
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and to set aside the Earl of *Morton's* Right, upon an Objection merely in Law, unsupported by Equity.

The Pursuers Alledgeance, that the Earl of *Morton* was in no Condition to make such a Loan, but was supported by the Bounty of *Charles I.* is equally groundless. If it were true, it could not affect the present Question, nor would the Defender incline to deny or lessen the Liberality of that Monarch towards his Ancestor.

But the Fact is otherwise, *Charles I.* during the greatest Part of his Reign, was in want of Money, and obliged to make use of the Credit of such of the Nobility as were most strictly attached to him. At this time, *William* Earl of *Morton* was possessed of one of the best Estates in *Scotland*; he had the Property of *Dalkeith*, *Calder Clear*, *Kinross*, and *Aberdour*. But this great Estate was so much reduced by the Debts which he contracted in support of the Crown, during this Reign, that none of his Successors ventured to represent him; and this involved Situation of the Affairs of that Family, occasioned by their Attachment to *Charles I.* though it ought to have insured them the Favour of *Charles II.* did not, however, prevent, but rather occasioned, those *Hardships* and *Stretches* which, after the Restoration, deprived them of their Right to *Orkney* and *Zetland*, without Payment of above one eighth Part of the Redemption-money stipulated; for that Family, in fact, received back no more than 4000 *l.*

Lord *Morton's* cautionary Engagements for *Charles I.*

There remains Evidence still upon Record, with regard to several of those cautionary Engagements in which the Earl of *Morton* became bound for *Charles I.* For it appears by the comptrollery Account 1632, that the Earl and his Son, and some of his Relations, borrowed, for his Majesty's Service, from *William Dick*, no less than 200,000 *l. Scots*. The Article is thus entered in the Discharge of these Accounts. "Item, To *William Dick*, as for the Annualrent " of 200,000 *l.* frae *Martinmas* 1632, to *Whitsunday* 1633, borrowed " frae him at *Martinmas* 1632, by *William* Earl of *Morton*, and " *Robert Lord Dalkeith*, his Son, as Principals, and certain their " noble Friends, as Cautioners, for his Majesty's Service." The same Accounts refer to another Sum of 10,000 *l. Sterling*, borrowed by Lord *Morton*, at his Majesty's Desire, to be given to the Earl of *Mar*, which Sum was repaid to Lord *Morton* out of the said 200,000 *l.* borrowed of *William Dick*. There is further mentioned, a Sum borrowed by Lord *Morton* and Lord *Traquair*, for his Majesty, from Lord



Lord Napier, and another Sum borrowed by them from Maule of Panmure.

In Opposition to this, the Pursuers endeavour to prove, that the Earl of Morton had received great Bounties from the Crown, and particularly refer to the Account of the Taxation 1621, for one Payment of 36,000 *l. Scots*, or 3000 *l. Sterling*; to Lord Haddington's Collections for another Payment of 3000 *l. Sterling* more; to the comptrollery Accounts 1632, for a third Payment of 10,000 *l. Sterling*, with Interest; and to the same Accounts for a fourth Payment of 5000 *l.* more, making, in all, 21,000 *l. Sterling*.

The Article of the Taxation-account 1621, referred to for Proof of the first of these Payments, is in these Words: "Be Precept of the said umquhile King James, of most worthy Memory, of the Date, the——Day of——Sixteen hundred and twenty——Years, to William Earl of Morton," as the said Precept, with his Acquittance, registrate in the Books of his Majesty's Exchequer, upon the——Day of——Sixteen hundred and twenty——Years, bears 36,000 *l.*

The Records of Exchequer, for many Years after the Year 1620, during which Period, this Discharge is said to have been registrate, are a-missing; if they were extant, it is highly probable, from the Manner in which this Article is stated, and the Formality of registering the Discharge, that it would from thence appear, that this Precept was not given as a Benevolence, but in Payment either of a Debt, or as the Salary annexed to some Office, which the Earl of Morton enjoyed under the Crown. What Office he enjoyed at that time is not now distinctly known, from the Defect of the Records; but it is certain, that he was Lord High Treasurer in 1632.

The second Payment said to be vouched by Lord Haddington's Collections, appears evidently to be the same with the first; it is precisely the same Sum; and it appears from the indefinite Manner in which the Article is stated in the Account of the Taxation 1621, that the Sum there mentioned was only paid between the 1625 and 1630, which sufficiently corresponds with its having been paid, as Lord Haddington says, in July 1628.

With regard to the third Payment, mentioned by the Pursuers, of 10,000 *l. Sterling* and Interest, the Manner in which that Article is stated in the Comptrollery-accounts 1632, affords no Handle or Pretext for mentioning it as a Benevolence to Lord Morton. It appears, by these Accounts, that the King had given a Precept to Lord Mor-



for 10,000 l. that Lord Morton, by his Majesty's Direction, had borrowed Money to answer that Precept; that he had afterwards borrowed a larger Sum from *William Dick*, and out of this last, had repaid the 10,000 l. borrowed for Lord Mar, with half a Year's Interest due. The Words of the Account relative to this are as follows: In the Charge, "*Item, The Comptaris charges them with the Sum of 200,000 l. Scots, borrowed by them from William Dick, at Martinmas 1632, for Payment making to William Earl of Morton of the Sum of 10,000 l. Sterling, which his Lordship had paid to the Earl of Mar, by his Majesty's Direction, &c.*" In the Discharge, "*Item, There ought to be defeated and allowed to the said Noble Earl, William Earl of Morton, one of the Comptaris, 6000 l. Scots, for the Annualrent of 10,000 l. Sterling, frae the Term of Whitsunday 1632, to Martinmas 1632, borrowed by his Lordship, at his Majesty's Direction, to be given to the Earl of Mar, conform to his Majesty's Precept, bearing Annualrent, as the same produced in the former Account of Comptrol-lerie bears.*"

"*Item, There ought to be defeated to the foresaid William Earl of Morton, one of the Comptaris, the Sum of 10,000 l. Sterling, at Martinmas 1632, in Payment and Satisfaction to him of the like Sum paid by his Lordship to the Earl of Mar, by his Majesty's special Direction, in compleat Payment of his Majesty's Precept, granted to his Lordship, whereof the said Earl of Mar made Assignment to the said Earl of Morton, as the said Assignment herewith produced bears.*"

After having thus transcribed the Words of the Account, relating to this 10,000 l. the Defender, without any Observation, submits it to your Lordships, if it was fair or candid in the Pursuers to insinuate, that this was a Benevolence, which *William Earl of Morton* had received from the Crown.

The fourth Payment mentioned by the Pursuers, is of 5000 l. Sterling, vouched by the Comptrollery-accounts 1632: But, from the Manner in which that Article is stated in these Accounts, there is no Reason to conclude, that it was a Benevolence. It is first mentioned in the Charge, at the End of the Article already recited, which mentions the 200,000 l. borrowed by Lord Morton from *William Dick*, "for Payment making to Lord Morton of the 10,000 l. Sterling, which his Lordship had paid to the Earl of Mar by his Majesty's Direction, and of the Sum of 5000 l. Sterling, granted by his



*his Majesty to his Lordship's self by Précept, and of certain bygone Interest, and others his Majesty's Services."* It is again mentioned in the Discharge thus: "*Item, There ought to be defeated and allowed to the said William Earl of Morton, one of the Comptaris, 6000 l. Scots, as the Interest of 5000 l. Sterling, frae Martinmas 1631 to Martinmas 1632, granted to his Lordship by his Majesty's Précept, bearing Annualrent, as the same, of the Date 8th February 1630, produced in the former Account of Comptrollerie bears.*" In a subsequent Article, Credit is taken for the 5000 l. itself.

From this Manner of stating the Article, it appears highly probable, that the Précept for 5000 l. had been granted to Lord Morton, on account of Money advanced by him *for his Majesty's Service*: Nor is it to be believed, that if it had been a Gratuity, the Précept would have bore Interest, as it did from the Date, when the Rate of Interest was at that time *Ten per cent.*

The Pursuers, diffident, it would seem, of the Proofs they referred to on Record, have had Recourse, on this Subject, to the vague indeterminate Assertion of two Writers of private Memoirs. This is somewhat unusual in a Court of Law, and the Defender cannot think it incumbent upon him to enter into a serious Refutation of Evidence of this Sort.

The Pursuers next maintain, that the Family of Morton, after the Reduction of their Right in 1669, for the Want of a previous Dissolution, had received full Payment of the 30,000 l. of Redemption-money, and voluntarily renounced all Claim; for Proof of which, the Pursuers refer to certain Letters on Record, which pass between the King and the Lords of the Treasury, from the 1669 to the 1686.

But these Letters do, by no Means, support the Pursuers' Alledgeance. The Letters are eight in Number; as they pass between the King and the Treasury, the Defender's Predecessor was no Party to them; and therefore, any Evidence which may arise from them, can never be conclusive against him: But the only Facts which appear from these Letters are, That it had been resolved, right or wrong, to deprive the Family of Morton of the Isles of Orkney and Zetland; that the Sum paid by the Crown upon that Occasion, in full of the 30,000 l. of Redemption-money, was no more than 4000 l. and, for some Years, Interest was paid upon 6000 l. more; but the Capital of that 6000 l. never was paid, though it had been frequently promised. The Pretext laid hold of, for detaining from the Family of Morton the

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the remaining 20,000 *l.* was, that the King had obtained a Decree, in Absence, against Lord *Morton*, for 12,000 *l.* as the Value of a Ship, which had been cast away upon the Coast of *Zetland*; and that Lord *Morton* had further received to the Value of 6113 *l.* 18 *s.* 8 *d.* for Feus and Wadfets in *Orkney*.

There was however no Foundation, either in Law or Equity, for these two Articles of Compensation; for, with regard to the Ship cast away on the Coast of *Zetland*, the Earl of *Morton* had Right thereto by the Terms of the Contract of Wadfet itself, by which, “ the Right of Admiralty, so far as pertained to his Majesty, or pertained of before to umquhile *Patrick*, Earl of *Orkney*, within the said Earldom, Lordship, and Isles belonging thereto, are expressly conveyed, together with all and sundry Liberties, Privileges, Fees, Casualties, and other Commodities whatsoever, pertaining to the said Office and Jurisdiction of Admiralty.”

And therefore it was a most unjust Handle which was devised, in order to strip Lord *Morton* of his undoubted Right to these Islands, that a Process was brought against him, when out of the Kingdom, for a random Sum of 12000 *l.* as the Value of a Ship, to which, if he really intromitted with it, he had Right, as Admiral, and tho’ Decree past against him in Absence, without any Proof, for this ill founded Claim, yet that was evidently no other than an Act of Power, which Lord *Morton* found himself unable to resist, and therefore alone did not oppose.

The other Ground of Compensation for 6113 *l.* 18 *s.* 8 *d.* Sterling, which Lord *Morton* is said to have received for Feus and Wadfets in *Orkney*, is equally groundless; for, by the Charter on Record, granted to him under the Great Seal, dated 4th November 1646, he is expressly impowered to grant Feus, and his Majesty thereby renounced all Grassums, Compositions and Entries, and declared that these should not be imputed as any Part of the 30,000 *l.* and the Renewal of the Grant to Lord *Grandison*, for Behoof of Lord *Morton*, is expressly in the same Terms. And the Letter itself referred to by the Pursuers, 29th January 1670, which suggests this fictitious Claim for 6113 *l.* 18 *s.* 8 *d.* acknowledges that Lord *Morton* had a Right to set Feus and grant Wadfets. The Words of the Letter are: “ It would be hard to quarrel the Rights of Feus and Wadfets, seeing the Earl of *Morton* and Viscount *Grandison* had Warrant under the Great Seal for granting them.”



In this Manner Lord *Morton* was first stripped of his undoubted Right by a Decreet of the Court of Session in 1669, for the Want of a previous Dissolution; which Decree it was thought necessary to ratify by a solemn Act of Parliament: And thereafter, by fictitious Counter-claims against him, the Redemption-money to be paid, was reduced to 10,000 *l.* In this Situation, it had been better perhaps, that Lord *Morton* had not accepted of the 4000 *l.* paid, or of the Interest of the 6000 *l.* more, which was promised, but never paid. But it is not to be wondered at, that he did accept of it, when he was deprived of his Right by an Act of Power, which it was in vain to resist, and against which there was then no Prospect of a Remedy. It was made a Condition of the Payment of this Trifle, that he and his Son should subscribe a Renunciation of their Right, which it is very possible they did subscribe, as is mentioned in one of the Letters referred to by the Pursuers. But this could never justify that Act of Oppression, by which they were reduced to the Dilemma of renouncing their Right, for so small a Sum, or of losing it without Recompence.—As soon as an Opportunity offered by the Revolution, of representing the *Hardships* and *Stretches*, which this Family had suffered; the Parliament was applied to in 1693, and the Case fairly stated. The King's Advocate was by the Parliament appointed to make Answers, which was accordingly done, with much Zeal and Eagerness, stating and even exaggerating every possible Objection against the Justice or Equity of Lord *Morton's* Application, and particularly insisting upon the Circumstance of his having accepted of the 4000 *l.* and of the Interest of the 6000 *l.* but it was not pretended, either that the 6000 *l.* itself had been ever paid, or that the Wadset had been originally gratuitous. Notwithstanding which Answers, the Parliament was so fully satisfied of the Truth of the Facts, which were then recent, and of the Justice of the Claim, that they did recommend Lord *Morton's* Case to the Crown, “ To the Effect that their Majesties “ might consider what *Hardships* and *Stretches* he and his Predecessors had suffered by the Decreet and Act of Parliament 1669. This Recommendation of Parliament, though renewed in 1702, experienced those Delays which too frequently attend Solicitations of every Sort. In 1707, however, an Act passed, dissolving these Islands from the Crown, that her Majesty might make a new redeemable Grant of them in favour of the Defender's Predecessor; and as it was considered, that though 4000 *l.* of the Redemption-

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money had been paid by *Charles II.* yet no Interest had been received upon 20,000*l.* for a long Tract of Time, and upon the remaining 6000*l.* only for a few Years. For these Reasons 30,000*l.* was fixed upon as the Sum upon which the Islands should be again declared redeemable; but so strictly were Matters taken, that, on account of the Difference of the Interest of Money at that Time, from what it was at the Date of the original Grant, this new Right was burdened with a Feu-duty of 500*l.* *Sterling* annually, and, in these Terms, her Majesty Queen *Anne* executed a Grant, in favour of the Defender's Predecessor.

The Pursuers take hold of some Expressions in a Memorial, offered to this Court, for one of the Defender's Predecessors in the Year 1718, in a Process against him, at the Instance of Sir *Andrew Dick* and *William Brown*, as if it had been there acknowledged, that the original Grant of these Islands in the 1643 was merely gratuitous, that the Reduction thereof in 1669 was just and equitable, and that the second Grant in 1707, was a Favour from the Crown, to which the Family had no Claim.

But your Lordships will readily perceive that this is a mere Catch. The Question in that Process at the Instance of *Dick* and *Brown*, was, Whether, by the Grant 1707, the Earl of *Morton* represented his Predecessor in the Right to these Islands, so as to be bound to fulfil a Deed, alledged to have been granted by his Predecessor in the 1647, a Deed liable to many Suspicions, and which there was Reason to believe had been actually discharged on Payment? The Earl of *Morton* maintained that the Grant 1707, was to be considered in the Eye of Law, as an original Grant to himself, proceeding from the Favour of the Crown; that it was to be considered as a Grant *per modum gratiæ*, and not *per modum justitiæ*. This Plea, in order to defend against a suspicious antiquated Claim, was very properly insisted on by the late Earl of *Morton*; and your Lordships accordingly found, "That the Mortgage 1707 proceeded, and " was granted *per modum gratiæ*, and not *per modum justitiæ*." But by this Decree it was neither found nor implied, that the original Grant 1643 was gratuitous. The rigorous Nature of the Reduction 1669, though founded on strict Law, was still undeniable, and it was highly equitable in her Majesty, to make the Grant 1707, although she could not by an Action have been compelled to grant it.

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The Pursuers aver, with much Confidence, that by the Possession of these Islands from the 1707 to the 1742, the Mortgage, Capital and Interest, was twice extinguished, and 8840 *l. Sterling* over, And for Proof of this, they refer to a Rental annexed to their Memorial, by which they make the free Produce of the Estate, all real Charges deducted, no less than 2753 *l. Sterling* annually; and this they pretend was also the free Rent in 1742.

But nothing can be more unfair than this State of the Case: The Rental made up by the Pursuers, is grossly erroneous in many respects: For 1<sup>st</sup>, The Conversions are stated greatly above the com-<sup>State of the</sup>mon Conversions of the Country in Sales, Ministers Stipends, &c. <sup>Rental.</sup> And it is only such medium Price that can be considered in a Question of this Sort; and the real Quantity of the Butter and Oil is less than is stated.

2<sup>dly</sup>, The Pursuers in their Rental have allowed no Deduction on account of the Land-tax, nor for the Feu-duty of 500 *l.* payable to the Crown, nor for Factors Salary nor Expences of Management, nor other necessary Deductions. They pretend indeed, that the Land-tax, which amounts, at 4 *s.* in the Pound, to no less than 241 *l.* 6 *s.* 8 *d.* *Sterling* yearly, is compensated by *Fines from Tenants, Kelp, Poultry, Peats, Geese, and other casual Rents.* With regard to *Fines from Tenants*, the Defender does aver, that for 20 Years back he has not received of *Fines* to the Amount of 200 *l. Scots* in whole; and, with regard to *Kelp*, the Pursuers know well, that, till within these seven Years, there was none made for Lord Morton's Account in these Islands. The Defender's Factor met with the utmost Opposition upon his attempting to do it, and no less than two Processes are upon that Account now depending against him before this Court. The Pursuers know that *Kelp* can only be made once in three Years, and yields Lord Morton but a Trifle. With regard to *Poultry, Peats, Geese, and other casual Rents*, the whole of these have been constantly allowed as a Perquisite to the Factor, and make no Addition to the Defender's Rent. The Factor is besides allowed a considerable yearly Salary for the Trouble of collecting the Rents of these Islands from an infinite Number of Hands; and this, in the present View of the Case, must be considered as a Deduction equally necessary as the Land-tax.

The Pursuers admit of no Deduction upon Account of the 500 *l. Sterling* of Feu-duty, payable by the express Terms of the Defender's Right, to the Crown, because, upon two different Occasions, the Crown has been pleased to make a Grant of that Feu-duty to  
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the Defender's Family. But, by the same Rule, they might explain any other Favour bestowed by the Crown, upon the Defender or his Family, as an Addition to the Rental of these Islands. Upon the whole, when the true and just Extent of the Rental, as it stood in the Year 1742, is fairly considered, it had not yielded to the Defender, at a Medium (after deducting the necessary Burdens and Charges) more than 1350 *l. Sterling* yearly, attended with the grievous Disadvantage of very tardy and irregular Payments, and an Arrear seldom less than 5000 *l. Sterling*, and attended, besides, with a certain and very considerable Loss, by the Bankruptcy of many of the Tenants of the Earldom.

The Defender has been more particular, than, perhaps, was necessary, in stating the true Amount of the free Rent of these Islands, in order to set in a proper Light the Insinuation which the Pursuers have been pleased to throw out, as if his Majesty and Parliament had been misled in 1742, by an improper State of the Facts; when the Defender, in his Petition to Parliament, set forth, "That  
 " the Annualrents and Profits arising from the Premises, after deducting the Feu-duty, thereby made payable to the Crown, and  
 " the other Charges and necessary Out-goings, was not sufficient to  
 " answer and discharge the legal Interest of the said 30,000 *l.* and  
 " the said Rents were so ill paid, that there was then an Arrear  
 " of 6000 *l. Sterling* and upwards, so that it could never become  
 " the Interest of the Crown to redeem the same." Whether this was a just State of the Facts is submitted to your Lordships upon what has been already set forth.

The Pursuers seem to have had it in View, in the Introduction to their Memorial, to serve two further Purposes. In the *first* place, to fix the Period when the pretended Increase of the Weights begun; and, *2dly*, to inculcate an Opinion, that the Inhabitants of *Orkney* are exposed to great Oppression by the Grants which have been made to the Defender and his Predecessors.

It is, no doubt, extremely material for the Pursuers, in support of the Conclusions of their Libel, to show at what Period the pretended Increase first commenced; and, though they have very properly made Choice of a Period extremely remote and obscure, yet they have been far from successful in their Endeavours to prove, that, at that time, there was any real Increase made, or even attempted. If they had proved that, about 200 Years ago, the Weights were different, this could have no Manner of Effect to diminish the Rents and Duties which have been paid for a hundred  
 Years



Years backwards. But it is easy to show, that the Pursuers have not made good their Alledgeance, that the Weights were less before the 1584 than they are at this Day.

For what is the Amount of all that they have produced on this Head, after a most laborious Search into every Record relating to this Period, although they have discovered several Complaints against *Robert* and *Patrick* Earls of *Orkney*, at the Instance of the Inhabitants of these Islands; yet not one single Insinuation is to be found of any Increase of the Weights, although this was an Offence which touched the Inhabitants, in general, more nearly than most of those Things with which the Earls of *Orkney* appear to have been charged. That these two Earls were guilty of many particular Acts of Oppression, is fully proved from the Records; but it is also proved, that loud Complaints were made against them on these Accounts, and if, as is pretended by the Pursuers, they had increased the Weights from 12 Pounds to 18 Pounds, it is impossible that this should not have been perceived, complained of in the loudest Manner, and rectified as soon as known; yet not one Word is to be found on Record, of any Complaint upon this Account. There is still extant in the Records of Parliament, a Summons of Forfeiture in the 1606, in which are enumerated no less than eleven different Articles of Accusation against *Patrick* Earl of *Orkney*; but his greatest Crime, of increasing the Weights, is no where mentioned; and, indeed, all Probability that he should have ever thought of this Method of increasing his Revenue, is overturned by one of the Articles of that Summons, by which it appears, that, upon two different Occasions, he imposed and exacted, by his own Authority, a Tax of no less than 20,000 *l. Scots*. A Person who was capable of exacting Tribute, with all the Authority and Violence of an absolute Prince, never could have submitted to the pitiful Task of gradually and surreptitiously increasing the general Weights of the Country, in order to augment, by slow Degrees, his established Revenue.

The Pursuers, after an unsuccessful Search for Complaints against *Robert* and *Patrick* Earls of *Orkney*, for encreasing the Weights, seem to have thought their Labours fully rewarded, by an Entry in the Privy Council Record, 10th May 1620, relating, as they pretend, to Lord *Ochiltree*, who was then Tacksman, mentioning, " That Information had been made to the Lords of Privy Council, of many " Abuses, Insolences, and Offences, of which this was one, That the " Impositions and Burdens raised and laid upon the Country by the  
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“ late Earl of Orkney, and most worthily discharged by the King’s  
 “ Majesty and his Commissioners, are now exacted and uplifted with  
 “ greater Rigour nor at any Time before: And, 2dly, That the  
 “ Weights and Measures of the Country, wherewith the poor Ones  
 “ pay their Farms and Duties, are yearly altered and changed, with-  
 “ out Warrant, and against the Form prescribed by the late Act of  
 “ Parliament.”

Upon this Excerpt from the Records, the Pursuers make the fol-  
 lowing Remark, “ All which having been strictly examined and  
 “ found true in Fact, this Farmer was deprived of his Lease, and  
 “ condemned to a long Imprisonment in the common Goal of E-  
 “ dinburgh, as appears by two other Entries in the Records of  
 “ Council.”

But when this Part of the Records of Council has been examin-  
 ed, of which a Copy is subjoined, it appears *first*, That the Com-  
 plaints mentioned in the Record, related only to *Zetland*, and not  
 to *Orkney*. The Words of the Record are, “ Forasmikleas In-  
 “ formation has been made to the Lords of secrete Council, of  
 “ mony great Abuses, Insolencys and Offences, very frequently  
 “ committed *within the Bounds of Zetland*.” 2dly, There is no  
 Mention of Lord Ochiltree in the Complaint. 3dly, The Clause of  
 the Complaint, relating to the Weights and Measures, is from the  
 Words of it as above recited, not a Complaint that the Weights  
 were increased, but only, *that they were yearly altered and changed*  
*without Warrant*: And the Words which immediately follow, “ a-  
 “ gainst the Form prescribed by the late Act of Parliament,” plainly  
 shew, that this was no other than a vague general Accusation, thrown  
 in amongst a long Enumeration of other Particulars of pretended  
 Grievances, such as, “ That the Sabbath was profaned with unne-  
 “ cessary and untimuous Carriages; that Adultery, Incest, and o-  
 “ ther Crimes, were tolerated and overseen, &c.” and imported  
 nothing more, but that the Inhabitants of *Zetland* wished to have  
 their Weights and Measures regulated agreeable to the noted Act  
 which had passed recently before, in the Parliament of *Scotland*,  
 19th of *February*, 1618. 4thly, With regard to the Impositions  
 and Burdens, said to be raised and laid upon the Country, by the  
 late Earl of *Orkney*, which were then exacted with greater Rigour,  
 there is no Evidence to explain what these pretended Impositions  
 were. We know that he exacted Tribute, and very probably may  
 have imposed other Burdens; but it is plainly impossible to explain  
 this



this vague Expression in the Complaint, as relative to the Weights. But, 5thly, There is not the smallest Evidence, but rather the contrary, that any one Article in this long Complaint, was well founded: For though it appears that the Bishop of Orkney, and two other Gentlemen, were appointed “To resort and repair to the Bounds of Zetland, and there to try and inform themselves truly and sufficiently, concerning the saids Abuses, and frae whom the Ground and Occasion of the same has and doth proceed.” Yet there is no Report, upon Record, made by them, which must undoubtedly have followed, had the Complaints, or any Part of them, been found true.

The Pursuers, indeed, strongly aver, *That all these Things had been strictly examined, and found true in Fact*; and that Lord Ochiltree had been thereupon deprived of his Lease and imprisoned: And in their very methodical Arrangement of the Proof, Part 2d, Head 3d, Article 1st, they again pretend to have discovered, that Lord Ochiltree had sought to augment the Weights, but had failed in the Attempt, and was punished for it: But all this is mere Invention, and is expressly disproved by the Records: Lord Ochiltree's Lease, which is still extant in the Privy-seal Records, b. 82, fol. 280, appears to have been for nine Years, commencing at *Martinmas* 1613, and of course, ended at *Martinmas* 1622; and it appears by the same Record, that Sir John Buchanan's Lease, who, the Pursuers acknowledge, immediately succeeded him, commenced at *Whitsunday* 1622; and therefore, Lord Ochiltree appears to have enjoyed his Lease till within half a Year of its expiring. Whether or not he gave up this half Year, upon a Transaction with Sir John Buchanan, cannot now be discovered; but it appears that he had only been imprisoned about the Year 1627, for there is an Entry in the Privy Council Records, 10th November 1631, mentioning an Application which had been made by Lord Ochiltree's Lady, for Access to see her Husband, who was then ill; in which she mentions, “That thir four Years bygane she had not had Occasion to confer with her Husband.” And farther, there is clear Evidence from the Record, that the Cause of his Imprisonment was not on account of any Offence committed by him in Orkney, but for the Crime of *scandalum magnatum*, for which he was afterwards ordered to be tried, as appears by the King's Letter, inserted in the Records of Privy Council, 17th November 1631, setting forth, “That the Lord Ochiltree having been examined before our Council here, touching  
“ some



“ some Information given by him, *reflecting upon some of the Nobility of our Kingdom*, We have been pleased to remit him thither, to be tried conform to the Laws thereof, &c.” It was therefore very inexcusable in the Pursuers to aver, that Lord Ochiltree had either been deprived of his Lease, or imprisoned on account of the Weights, when they must have known that their Alledgeance admitted of so direct a Refutation from those very Records to which they have appealed.

With regard to the Pursuers Insinuations, that they are exposed to many Hardships and Oppressions by the Grants which have been made to the Defender's Family, your Lordships will perceive from the Proof, that before the groundless Prejudice taken up by the late Sir *James Stuart* about the Year 1733, no Complaints were ever heard of with regard to the Conduct of the Defender's Family, or those acting under them. In later Times, the Pursuers themselves complain of nothing but this Chimera of the Weights; and it is certain, that ever since the Family of *Morton* had Right to these Islands, their Ancestors never did complain. Nor is this without Proof: A Book, containing the whole Proceedings of the Gentlemen of these Islands from the Year 1660 to 1678, has been lately recovered, after much Difficulty, from *James Mackenzie*, the Pursuers Antiquarian, in which there are found the strongest Declarations, by repeated publick Meetings, of the Gratitude of the Gentlemen of *Orkney* to the then Earl of *Morton*, and their high Sense of the Attention he had given to their Interest, but not one Insinuation of any Grievances they had suffered, or the least Complaint with regard to the Weights. Even at this Day, the Pursuers, who make such a mighty Noise, are a very inconsiderable Part of the Landed-interest of *Orkney*; and there is not one single Inhabitant of *Zetland* who has been prevailed upon to join in the Cry. The Defender cannot help adding this general Observation, which will be found to hold true in the present Case, that the oppressive Exactions of small Proprietors and little Lairds are always more destructive and severe upon the Inhabitants of a Country than the Management of an extensive Estate, intrusted to the Care of Factors or Chamberlains. Some Instances might be mentioned to illustrate this Maxim, from what has happened in the Islands of *Orkney* and *Zetland*. Although Lord *Morton* has not received 200 *l. Scots* of Fines from his Tenants for 20 Years back. It is no uncommon thing amongst *Orkney* Heritors to levy a Fine of a Year's Rent



Rent once in three Years; and although it has been the Earl of *Morton's* Practice, in Consideration of the occasional Badness of the Crops, in place of exacting penal Prices, as the Pursuers pretend, to account with the Vassals, as well as with his own proper Tenants, for their Deficiencies of Malt, &c. at Prices considerably below the current Prices of the Country; yet there are Instances where several of the Country Lairds did not communicate these Eases to their Tenants, but exacted from them higher Prices than were exacted of themselves, not only for the Rents payable properly to them, but also for the Deficiencies of Lord *Morton's* superior Duties.

The Pursuers have taken much pains to prove that the Assayers and Custodiers of the Standards for regulating the *Pundars* and *Bysmars*, have been from time to time appointed by the Grantees and Farmers of this Country, interposed betwixt the Inhabitants and the Crown. This no doubt is a Point extremely material for them to make out, in order to create any Probability of an Increase in the Weights; but they have entirely failed in their Proof of this, as will appear to your Lordships by the following State of the Fact vouched by authentick Documents in Process. Assayers and Custodiers of the Standarts.

It appears to have been the ancient Practice of the Heritors or Land-holders of these Islands to meet together, and deliberate concerning the common Interest of the Country, and to enact such By-laws and Regulations as seemed expedient. There are extant the By-laws made by these Meetings from the 1615 downwards, tho' their Meetings for these Purposes seem to have been discontinued from the End of the last Century.

By an attested Copy of these Acts produced in Process, it appears, that Assayers or Adjusters of the Weights of the Country were from time to time appointed by these Meetings from the 1659 downwards.

The first Sederunt to which the Defender shall refer upon this Subject, is dated the 4th of *February* 1659, and begins as follows: Geo. Mowat's Nomination.

“ Which Day, the Justices of his Highness's Peace for the Shire  
 “ of *Orkney* and *Zetland*, being met in Quarter Sessions, ordered,  
 “ &c.” Then follows: “ It is likewise ordered, that *George*  
 “ *Mowat* be appointed Keeper of the saids Weights, and Juster  
 “ thereof, and that all People repair to him for that Effect, &c. and  
 “ that the said *George* have an constant Salary allowed him therefor,  
 “ viz. 40 s. Sterling per annum, and that out of the publick Assessment  
 “ of the Shire, viz. 10 s. Sterling quarterly from the Collector there-

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“ of;



“ of; and that the *Pundars* and *Bysmars* be justed once every Year  
 “ betwixt *Lammas* and *Martinmas*, and that the said *George* have  
 “ for justing each *Bysmar* 4*s.* Scots, and for each *Pundar* 12*s.* Scots,  
 “ and that all *Pundars* within *Orkney*, not already adjusted, be done  
 “ accordingly betwixt and the 20th of *March* next.”

This Sederunt is signed by *Henry Watson*, which the Pursuers take hold of as a Pretence to alledge that the Assayer, upon this Occasion, was named by *Hary Watson*, who they say may have been a Dependent upon the Family of *Morton*. But your Lordships will readily perceive, that the Sederunt could only be signed by him as Preses of the Meeting; and the Fact is, that he was one of *Oliver Cromwell's* Officers, who at the Time resided in *Orkney*.

*George Morwat* continued in Office till the 1685, and during that Period there are a Variety of Acts establishing Regulations, with regard to the Manner in which he was to adjust the *Pundars* and *Bysmars*.

The Pursuers have greatly misrepresented the Import of some of these intermediate Acts, which renders it in some Measure necessary to recapitulate them.

On the 10th of *June* 1659, the Justices of Peace, at their Quarter-sessions, ordered a Fine to be levied from those who had neglected to send in their *Pundars* and *Bysmars* to be regulated, agreeable to the former Order, with Certification that a double Fine would be levied, if they failed to send them in before next Quarter-sessions.

On the 12th *November* 1661, there is a Sederunt of the Sheriff-depute, mentioning that divers of the Gentry of the Sherifffdom had appeared, and given in a general Complaint anent the unjust Measures and Weights of *Pundars* and *Bysmars*, and other Weights within the same, whereupon the Sheriff, with Consent of the remanent Gentry and Heritors of the Country, did unanimously refer to the Commissioners of Excise, to see all the *Pundars*, &c. adjusted and regulated, &c. and referred to the said Commissioners, who should be their Juster, and his Price, &c. and to give in a Report of their Diligence at the next Head-court in *January* thereafter.

Accordingly, at the next Head-court, 15th *January* 1662, there is the following Sederunt, which, on account of the Thinness of the Meeting, is only an Overture for an Act. “ It is ordered, at  
 “ the Head-court, by the Commissioners, with the Consent of the  
 “ Gentry, Udalers and Commons then present, that the whole *Pun-*  
 “ *dars*



“ *dars* and *Bysmars* within *Orkney*, should be regulated and adjusted  
 “ according to my Lord *Morton's Pundar* in the new House, and  
 “ that the Commissioners would be pleased to pass an Act there-  
 “ upon, at their first Meeting.”

There is next found in Record, a circular Letter, wrote by the Clerk, dated said 15th *January* 1662, intimating a general Meeting, by Order of the Head-court, upon the 28th of the same Month, for regulating the *Pundars* and *Bysmars* throughout the whole Country of *Orkney*.

A Meeting accordingly took place on the said 28th *January* 1662, and next Day, the 29th, the Meeting took up the Consideration of the Weights, as follows: “ The saids Commissioners ordered, that, conform to the *Iron Standart*, all the *Pundars*, “ within *Orkney*, should be made and justit by *George Mowat*, who “ is ordered to make and adjust them according to the particular “ Instructions following: *First*, the said *George Mowat* is, in every “ thing, to conform the said *Pundars* and *Bysmars* to my Lord *Mor-*  
*ton's Pundar and Bysmar in the new House, &c.*” Then follow particular Instructions as to a new Method of constructing the *Pundars*; and all *Pundars* and *Bysmars* are ordered to be brought in and adjusted before the first of *March* thereafter, otherwise to be burnt at the Cross of *Kirkwall*, and the Owners to be punished, as Users of false Weights. At the same time *George Mowat's Oath de fidei* was solemnly taken. The next Day, 30th *January* 1662, the Meeting regulated *George Mowat's Prices*.

At the next Meeting of the Land-holders, 14th *November* 1662, upon a great Complaint against the new Method of constructing the *Pundars*, they directed them to be all of new made and adjusted according to the old Form, and to be brought in for that Effect; and upon a Representation, that many in the Town of *Kirkwall* kept *Pundars* which were not lawful, whereby many poor People, that came to Town to sell their *Victual*, were much prejudiced, the Commissioners ordained, that there should be only -----*Pundars* kept by the whole Inhabitants in the said Town, till further Orders, to be kept by Persons to be named by the Commissioners. Of the same Date, 14th *November* 1662, there is a circular Letter ordering all *Pundars* and *Bysmars* to be sent in to be justed, conform to the old *Standart*, and the *Pundar in the new House*.

At a Meeting of the Commissioners of Excise and Supply, 3d *December* 1663, there is an Order in the following Words:

“ The



“ The whole Table ordains our Clerk to pay to *David Craigie* of  
 “ *Overfanda*, 20 Merks Scots, for the 16 Pound Weight of Brass,  
 “ which is in the Custody of *George Mowat*, our Juster's Hand, for  
 “ regulating the Weights of the Country.”

At the next Meeting of the Commissioners, 10th November 1664, *George Mowat* was ordered to deliver up “ That Weight of Brass to  
 “ *Arthur Baikie*, he was intrusted with by the Commissioners,” who was directed to bring from the South, for the Publick Use of the Country, an great Weight of Brass or Copper, weighing 28 Pound, and to deliver it to *Robert Irvine*, the Clerk and Collector, who was to pay what it truly cost, out of the readiest Money belonging to the Country.

There appear to have been no Regulations with regard to the Weights from this Time till the 10th November 1675, when the Steward-depute, several Years after the Reduction of Lord Morton's Right, issued an Order, that all *Pundars* should be sent in to be adjusted by *George Mowat*, and appointed *Arthur Baikie* of Tankerness, *James Baikie* of Barnes, *David Craigie* of *Overfanda* (the Person who purchased the 16 Pound of Brass) and *Patrick Craigie* of *Waddell*, to meet and concur with *George Mowat*, for laying down the most just and convenient Way of righting the said *Pundars* and *Bysmars*. — These are the intermediate Acts, relating to the Weights, made while *George Mowat* continued Adjuster.

Geo. Craigie's  
 Nomination.

After the Death of *George Mowat*, a new Assayer was appointed by the Landed-interest of these Islands: The Sederunt for that Purpose is dated 11th June 1685, and begins thus, “ The whilk Day,  
 “ *William Craigie* of *Girsa*, Steward and Justiciary-depute of *Orkney*, and the Justices of Peace, and Commissioners for Cess and  
 “ Supply, within the County of *Orkney*, and the Gentlemen of  
 “ the Country, convened for the Time; taking to their Consideration, that the deceased *George Mowat*, Wright in *Kirkwall*,  
 “ being Juster of the *Pundars* and *Bysmars* of the Country, and  
 “ that there is none yet appointed, since his Decease, in that Trust,  
 “ and thereby the Country in the mean time may suffer Prejudice, thro'  
 “ not having their foresaid Weights righted and justed; and therefore,  
 “ the saids Justiciary-depute, Justices of Peace, and Commissioners  
 “ for Cess and Supply, having Experience of the Honesty and  
 “ Knowledge, Ability and Faithfulness of *George Craigie*, Wright in  
 “ *Kirkwall*, and of his being apt and qualified for the foresaid Employment and Trust; they, therefore, with the Advice and Consent  
 “ of the Gentlemen convened for the Time, do nominate, com-  
 “ missionate,



“missionate, and appoint, the said *George Craigie*, Juster of the  
 “*Pundars* and *Bysmars* of the Country,—the said *George Craigie*  
 “finding Caution for his Fidelity, before he acts in the said Em-  
 “ployment.”

It is inserted in the same Sederunt, that *George Craigie*, by his  
 uplifted Hand, gave his Oath, faithfully, truly, and honestly, to  
 just and right the *Pundars* and *Bysmars*, “According to the Stan-  
 “dard or *Weight* by which they are to be justed.” Your Lordships  
 will observe, that the regulating Standards are here expressed in the  
 singular Number, which is likewise the Case in several other Seder-  
 runts; but at other Times they are expressed in the plural Number.  
 This Variety of Expression, in some of the Sederunts, has been very  
 frivolously insisted upon by the Pursuers, as a decisive Argument in  
 this Cause.

In consequence of the above Appointment, *George Craigie* gave  
 in a Bond, signed by two Cautioners for him, dated in the 1685,  
 which narrates the foresaid Act, appointing him to the Office.

There is another Sederunt of the same Gentlemen, dated 8th  
 of *August* 1685, appointing *Patrick Mowat*, Son of the former Ad-  
 juster, *George Mowat*, to give up the Standard-weights of the Coun-  
 try, to the said *George Craigie*, upon Oath, and appointing a Com-  
 mittee to take his Oath accordingly; and also, to take *George Craigie's*  
 Receipt thereof, which is ordered to be recorded.

The next Sederunt is dated the 19th of *July*, 1686, which men-  
 tions the Meeting of the Committee, appointed for taking *Patrick*  
*Mowat's* Oath: That the said *Patrick Mowat* had accordingly deliver-  
 ed up the said Weights to *George Craigie*, a List whereof is inserted  
 in the Sederunt, which, as shall be afterwards shewn, agrees with  
 the Standards exhibited by *Thomas Aitken* in the 1743; and *Patrick*  
*Mowat's* Oath bears, “That he had no more of the publick  
 “Weights of the Country, and that these now given up, are in as  
 “good Condition as when his Father received them.”

How long *George Craigie* continued in Office, is uncertain: He <sup>William Tait</sup>  
 was succeeded, however, by *William Tait*, Wright in *Kirkwall*,<sup>named.</sup>  
 the Minute of whose Appointment is not extant, but it is proved  
 that he was chosen in the usual Manner, and with the Approbation  
 of the whole Landed-interest, by a Sederunt of the Justices of Peace,  
 2d *November* 1710, which Sederunt bears the Names of nine of the  
 principal Gentlemen of the Stewartrie, and is introduced, as fol-  
 lows: “The saids Justices of the Peace, considering the Complaints



“ made to some of their Number, anent the Abuses and Irregularities committed by many in this Country, who do not only keep and make Use of false and unadjusted *Pundars* and *Bysmars*, but also unwarrantably, at their Hands, make, or cause make, *Pundars* and *Bysmars*, not agreeable to the Country Standard, and make Use of them daily without bringing them to the common Adjuster to be adjusted in the Terms prescribed by the Country Acts made for that Effect: Wherefore it is thought fit by the said Justices, that, in the first Place, the *Pundars* in the Girnel-house, for the Earldom and Bishoprick, be instantly adjusted by *William Tait*, Wright in *Kirkwall*, the common Adjuster, and being found by him to agree with the common Standard, that he seal them in the usual Manner.” Then follow certain Regulations for adjusting the *Pundars* over the Country:— “ And further; all in the Country are hereby discharged to make, seal, or adjust any *Pundar* or *Bysmar*, except the said *William Tait*, or who after him shall be appointed common Adjuster.”

Tho. Foubister named.

*William Tait* was succeeded by *Thomas Foubister*, but what was the precise Time of his Admission, does not appear from these Records of the Justices of Peace or Country Gentlemen; but it appears, that upon the 10th of *January 1719*, he applied to the Magistrates of *Kirkwall*, and desired their Authority for using a particular Seal, which he produced, for marking the *Pundars* and *Bysmars*. An Extract of the Act of Council, relative to this Matter, is produced, and is in the following Words: “ 10th *January 1719*, *Sederunt John Coventry*, Provost, &c. The said Day *Thomas Foubister*, Deacon of the Wrights, produced in Council a Stamp or Seal, marked *G. R.* for marking or sealing the *Pundars* and *Bysmars* to be made or adjusted by him, and craved the Authority of the Magistrates and Council for using the same, and that none other might make, adjust, or seal *Pundars* or *Bysmars*, but he, and the subsequent Deacons for the Time; which Desire the Council found reasonable, and do appoint the same accordingly.”

Tho. Aitken named.

*Thomas Foubister* was succeeded in the Office by *Thomas Aitken*, who is still alive. He was named to the Office, 14th of *March 1730*, by the Magistrates and Town-council of *Kirkwall*, who seem to have assumed that Power, partly from the Precedent which had been introduced by *Thomas Foubister*'s Application to them, above recited, in the Year 1719, and partly because of the Discontinuance of the Meetings of the Landed-interest, by whom the Assayers



Affayers had been named in more ancient Times ; and there seems to have been this further Reason for it, that from the Year 1725, till very lately, there were no Justice of Peace Courts held in *Orkney*, excepting those held by the Magistrates of *Kirkwall*, within their Royalty, relating to the Revenue, which is proved by *William Spence*, the Pursuers 6th Witness, State of Process, Page 90, G.

The Act of the Town-council of *Kirkwall*, appointing *Thomas Aitken*, is in these Words : “ 14th March, 1730, The said Day  
 “ the Magistrates and Council appoint the haill Weights for justing  
 “ of *Pundars* and *Bysmars*, formerly in the Custody of the deceased  
 “ *Thomas Foubister*, late Deacon of the Wrights and Hammermen  
 “ of this Burgh, to be, at the Sight of the Dean of Guild and  
 “ Clerk, delivered to *Thomas Aitken*, present Deacon of the said  
 “ Wrights and Hammermen, and hereby impower him to make  
 “ and adjust *Pundars* and *Bysmars* within this Burgh, *as former Deacons have been in use to do*, and to receive from the said Deacon a  
 “ Receipt of the said Weights, for Re-delivery ; which Receipt is  
 “ to be lodged in the Clerk’s Hands : And recommends to the said  
 “ Deacon to be careful and faithful in that Office ; likeas, he has  
 “ instantly given his Oath *de fidei administratione*.”

It thus appears, that publick Officers have been regularly appointed from the 1659, downwards, to whose Custody the Standard Weights for *Bysmars* and *Pundars* have been, from time to time, committed, and who have been intrusted with the Care of adjusting these Instruments. And though there is not extant proper Evidence of the regular Appointment of Affayers before the 1659, yet there is Evidence, from two of the Acts made at the Meetings of the Landed-interest, produced, that there must have been, in more ancient Times, such publick Officers, to whom the Care of the Weights was intrusted. The first of these Acts is dated in November 1615, and is in the following Words : “ *Item*, It is statute and ordained, That all *Pundars* and *Bysmars* be marked with  
 “ his Majesty’s Mark, betwixt and the — Day of — next  
 “ to come, under the Pain of 10 l. for the first Fault, and doubling  
 “ of the said Pain, sua oft as they shall happen to transgress there-  
 “ after.”

It is evident from this Act, that there must have been a publick Officer at that Time, who had the Care of adjusting *Pundars* and *Bysmars* ; and that it was the former Practice to mark them, is proved by a *Pundar* exhibited in this Process, marked <sup>E.</sup> P.O.

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The second Act, relative to this Matter, preceeding the 1659, is dated 7th February 1628, and is in these Words : “ The whilk  
 “ Day the said Sheriff-depute, with Consent foresaid (*i. e.* with  
 Consent of the haill Gentlemen, and Suitors of Court, and Commonalty present for the Time) ratifieth the Acts made of before,  
 “ That all *Pundars* and *Bysmars* shall be marked with the Mark  
 “ called *the King's Mark*, under the Pains contained thereintill,  
 “ with this Addition, that every *Pundar* shall be justed and made  
 “ equal with the King's *Pundar*, and that none have *Pundars* or *Byf-*  
 “ *mars of greater Weight*, under the Pain of forty Pounds, nor have  
 “ twa Stanes to ane *Pundar*, under the like Pain.”

This Act also evidently supposes, that there was a publick Officer, to whom the Care of adjusting and marking *Pundars* and *Bysmars* was committed. The Act was made with the Consent and Approbation of the whole Gentlemen of the Country ; and so far is it from expressing any Suspicion, of Attempts, by those acting in place of the Crown, to increase the Weights, that it is expressly appointed, that all *Pundars* shall be made equal to the King's *Pundar* ; and it is added, that none shall have *Pundars* of greater Weight ; which affords Evidence clear as Noon-day, that so far were the Farmers, or Grantees under the Crown, from increasing the Weights, that the King's *Pundar* was of less Weight than many *Pundars* at that time fraudulently made use of by others in the Country. And your Lordships will particularly observe, that these two Acts, in the 1615 and 1628, were made by the Country Gentlemen, recently after the Execution of *Patrick Earl of Orkney*, who is said to have increased these Weights in so extraordinary a Manner, and also recently after the Imprisonment of Lord *Ochiltree*, who is said by the Pursuers to have been imprisoned and deprived of his Lease, for Attempts of the same sort.

The Pursuers have been at great Pains to refute the Defender's Alledgeance, that the Assayers and Custodiers of the Standards, were not named by his Predecessors, or by those who had Right to the Crown-rents. They take notice, that the Defender had affirmed, these Assayers were named by the Magistrates of *Kirkwall*, and the Standards kept by these Magistrates, or by the Assayers by them appointed.

This Alledgeance was made by the Defender, from considering the Excerpts from the Town's Record in 1719 and 1730, abovereferred to, without having fully examined the Acts of the Landed-interest



Interest of *Orkney* and Justices of Peace, from which the Fact has been now more fully stated to your Lordships. It does unquestionably appear, that the Deacon of the Wrights of *Kirkwall* has been for a long Tract of Time intrusted with these Standards by Authority of the Town-council: And it is of no Importance, that such of the Magistrates of *Kirkwall*, as have been examined as Witnesses, do not remember to have seen these Standards, or any List of them in the Town's Books. This indeed proves, that there was no general Suspicion in the Country, with regard to any fraudulent Augmentation of the Weights, otherwise Enquiry with regard to the Standards must have been made by many different People; but no Inference can be thence drawn, contrary to the authentick Evidence produced, that these Standards were not constantly, since the Year 1719, in the Custody of the Deacon of the Wrights of *Kirkwall*, by Authority of the Magistrates: And it is a vain Pretence, that the Magistrates interposed, and gave a Commission to *Aitken* in the Year 1730, upon account of a Cry then raised, with regard to the Weights. There was no Cry at that Time, nor for several Years after, till the Quarrel happened between Mr. *Hay* of *Balbithan*, and Sir *James Stewart*, which, by the whole of the Witnesses, is agreed to have been the Period, at which this groundless Outcry took its Rise. Some of the Witnesses indeed mention Complaints, which were at different Times made against particular *Pundars*; but this was totally different from any Complaint or Suspicion of a general Increase in the Weights over the Country.

The Pursuers pretend, " That in the Year 1661, the Nomination of the Assayer was, by an Act of the Sheriff, referred on that particular Occasion to the Commissioners of Excise; that in the 1675, the Steward and Farmer of these Islands, named the Assayer, and issued an Order, that the whole *Pundars* and *Bysmars* of the Country should be sent in to him; that in the 1685, the Assayer was named by a new Farmer; and that in the 1691, the Steward and Farmer (*Elphinston* of *Lopness*) named the Assayer at the same time that he made an Act of his Court for augmenting the Weights."

With regard to the Act, 12th November, 1661, your Lordships will observe, from the Abstract of that Act, above recited, that the Sheriff-depute acted upon that Occasion with the unanimous Consent of the Gentry and Heritors of the Country. In the 1675, the Steward-depute interposed his Authority for a new Adjustment; but he



plainly acted in concurrence with the Country Gentlemen, four of whom were expressly named by him, to concur with the common Assayer, *George Morwat*. In the 1685, the Assayer was named, not by the Steward-depute, but by him, and the Justices of Peace, Commissioners of Supply, and Gentlemen of the Country: And, in the 1691, it appears, by the Record produced, that *Elphinston* of *Lopness* acted in conjunction with the Country Gentlemen and Inhabitants of *Zetland*.

Standards.

The Pursuers have, in their Memorial, exhibited a List of the Standards, which have been used for regulating *Pundars* and *Byssmars*, and have made a Calculation, to shew, how far they are from corresponding with each other, and of course, how unfit for the Purpose of regulating the Weights of a Country; upon which account, they take occasion to give them many hard Names, call them Trumperies, Trash, confused Rubbish, &c. and thereupon affirm, with much Confidence, "That these counterfeit Things, which the Assayer had endeavoured to obtrude for Standards, were a mere Novelty, having never been known or heard of, till produced to their Meeting in the 1743."

It is not essential to the Defender's Argument, to enquire, whether there has been kept in this Country any Standards of Weights at all, or by whom they were kept; it is sufficient for him, that, for Time immemorial, no Increase can be shown to have happened in the Quantities of Rent payable to him by the Proprietors of Land in these Islands: At the same time, for your Lordships further Satisfaction, he has already shown, that Assayers and Custodiers of the Standard-weights, have been, for One hundred Years past, regularly appointed by the Gentlemen themselves, or by the Magistrates of *Kirkwall*. And it will not be difficult to shew, that the Standards now produced are no Novelties, as the Pursuers pretend, but are the same which were delivered over upon Inventory in the 1686, to *George Craigie*, the Assayer then appointed, and which *Patrick Morwat*, the Son of the former Assayer, made Oath, were the same which had been delivered to his Father, who was first appointed in the Year 1659.

The Defender is not bound to maintain, that the rude Standards made use of in this remote Country have been all along mathematically just, he believes, that they are far from corresponding exactly with each other, and wishes, as much as any Man, that a proper Standard may be established in their Place, since he is persuaded, that



that he himself has been the principal Sufferer by their Inaccuracy ; But, at the same time, from the whole of the Evidence which has been recovered, he apprehends it is clear, beyond Doubt, that these are the ancient rude Standards, which have been used in these Islands, from Times more ancient than Record or Memory.

The Lists of these Standards, inserted in the Record of the Country-acts, and in the Minutes of the Meeting 1743, are as follows :

*LIST, 19th July, 1686, viz.*

Ane two Setting Weight of Stone, with ane Horn or Wither-weight hanging therewith.

*Item,* Ane other two Setting Weight of Stone, with ane Lead Wither-weight.

*Item,* Another two Setting Weight, without a Wither-weight.

Whilk three Weights have thereon Steeples fixed in them with Lead.

More, Ane 16 Mark Weight of Stone, with an Horn for a Wither-weight.

*Item,* Ane 10 Mark Weight of Stone.

*Item,* Ane 7 Mark Weight of Stone.

*Item,* Ane 4 Mark Weight of Stone.

*Item,* Ane Iron Stillyard, without an pending Weight.

*The List exhibited in 1743, viz.*

A two Setting Weight of Whinstone and Boar's Tooth.

Another two Setting of Whinstone and Piece of Lead.

Another two Settings of free Stone and Piece of Lead.

A 16 Mark Weight, a free Stone, Boar's Tooth, and Piece of loose Lead.

A 9 Mark Weight, a free Stone, and Piece of loose Lead.

7 Marks, a free Stone, Rope, and Piece of loose Lead.

4 Marks Weight, a round free Stone and Rope.

An Iron Stillyard, without an pending Weight.

Besides these seven Articles, which correspond to the List 1686, there are three additional Weights in the List 1743, viz.

One Setting, a free Stone and Piece of Lead.

2 Marks, a Lead-weight and Rope.

One Mark, a Boar's Tooth.

By



By comparing these two Lists, it will appear to your Lordships, that, in the essential Articles, they correspond sufficiently together. There appears indeed to have been assumed since the 1686, three additional Weights, viz. A Setting Weight, a 2 Merk Weight, and a one Mark Weight. This has probably been done for the Convenience of the Assayer, and, no doubt, by the Authority and Consent of the whole Country Gentlemen and Landed Interest, although no Record of their Proceedings in that Matter is now extant; but it is immaterial, whether it was done by Authority or not, since the two Setting Weights, which are the same as in the List 1686, afforded a sufficient Check, for fixing the Weight of the one Setteen Weight; and the 4 Marks Weight, which is described in the same Manner in both Lists, fully authenticates the two Marks, and one Mark Weight.

State of Pro-  
cess, p. 47.

The only other Differences between the two Lists, which deserve Notice, are, That the Weight, which in the List 1686, is called 10 Marks, is in the List 1743, called 9 Marks: But this appears to have been a Mistake of *Thomas Aitken*, the last Assayer, who gave up the List 1743; for, by the Weight, taken in Pounds and Ounces, of the Standard, which he denominated 9 Marks, it appears, that it really amounts to 10 Marks; and upon Inspection, it is found, that the Figure X is cut upon the Stone. The last of the three Weights of 2 Setteens each, is described in the List 1686, as without a Wither-weight; but, in the List 1743, a Piece of loose Lead is mentioned as belonging to it. Upon Inspection, the Piece of Lead is found to lie so flat upon the Stone at the Steeple, that it seems on that Account to have been omitted in the List 1686. But, what removes all Suspicion as to this Weight is, that it is found to weigh in Pounds and Ounces, less than either of the other two authentick Standards of two Setteens each, as appears by the List in the State of the Process, p. 47. Letter C: And therefore, upon the whole, it will appear to your Lordships, that these two Lists correspond together in such a Manner, as to remove all Suspicion, that any fraudulent Alteration has been at any time made upon these Standards. Indeed, if a Scheme of this Sort had ever been thought of, Care must have been taken to transform the Standards into a more accurate Correspondence with each other, than at present subsists amongst them, which never could be the Result of any Scheme to impose upon the Country.

Ancient Ren-  
tal of Orkney  
and Zetland.

The Pursuers advance a Fact, and take occasion from it to make a mighty Outcry, but which upon Examination will appear to be utterly



utterly groundless. They affirm, that at the time these Islands of *Orkney* and *Zetland* became subject to the Crown of *Scotland*, and for near an hundred Years after, the whole publick Revenue, arising out of them, when the Rights of Admiralty were not included, seldom amounted, by the Exchequer-records, to 440 *l. Scots per annum*; but that at present, the Crown-rent has swelled to fifteen times the ancient Rental; and upon this Fact they rest, with an Air of Exultation, as an indisputable Proof of Oppression by an Augmentation of the Weights.

But this Mystery admits of an easy Solution without obliging us to suppose the smallest Increase of the Weights. Before the 1468, these Islands were subject to the King of *Norway*, to whom certain Rents and Duties were payable out of them; but they had been granted away soon after the Conquest of them, which happened about the Year 875, by the King of *Norway*, to one of his Nobles, whose Brother and his Male-heirs continued in the Right of these Islands till the 14th Century. The Passage in *Torfæus*, the Historian of *Orkney*, relative to this, is as follows: *Orcades & Hialtlandiam Rex Haraldus, Rognualdo Mariæ comiti fiduciario jure possidendas heredibusque suis concessit. Rognualdus eas iterum fratri suo Sigurdo donavit.*

About the End of the 14th Century, upon the Death of *Magnus* Earl of *Orkney*, the last of the Male-line of the *Norwegian* Earls, the Succession devolved upon his Daughter, who had married the Earl of *Strathern* in *Scotland*, and by Descent from her, it came to the Family of *St. Clair*: *Henry St. Clair*, Earl of *Rosland*, obtained the Investiture of the Earldom of *Orkney*, anno 1379, from *Haco III.* King of *Norway*, and upon that Occasion executed a solemn Instrument, declaring his Homage and Fealty to that King. In the Year 1430, *William St. Clair*, Grandson of *Henry*, obtained in like manner the Investiture of these Islands from the King of *Norway*.

When in the 1468, these Islands were mortgaged by the King of *Denmark* and *Norway*, to *James III.* This *William St. Clair*, Earl of *Orkney*, was alive, and therefore the Mortgage could only be with the Burden of his Right: But in the 1471, *William St. Clair* sold his Right in the *Orkneys* to *James III.* and obtained in Exchange thereof, certain Lands of considerable Value in *Fife*. This is proved by an Act which passed in Parliament, and is preserved in *Lord Haddington's* Collections, for validating the Grant of the Lands in *Fife*, which had been annexed Property, to *William St. Clair*, and for annexing the *Orkneys* to the Crown.



After the Crown of *Scotland* came thus to have Right both to the Revenue, formerly payable to the King of *Denmark*, and to the Ground Rents which were the Property of the Family of *St. Clair*. *William* Bishop of *Orkney*, and after him *Andrew* Bishop of *Orkney*, were allowed to enjoy the whole of that Revenue, from the 1474, down to the 1501, upon Payment of a Quit-rent of 476 *l.* 13 *s.* 4 *d.* Scots.

In the 1501, the Family of *St. Clair* obtained from *James IV.* a beneficial Lease of these Islands, for nineteen Years, on Payment of a Quit-rent of 433 *l.* 6 *s.* 8 *d.* Scots, and he continued in Possession at this Rent, and after him his Widow, down to the 1540, notwithstanding a Grant made by *James V.* in 1530, to *James* Earl of *Moray*, for Payment of 446 *l.* 13 *s.* 4 *d.* Scots, which Grant appears never to have taken Effect. About the Year 1540, *Oliver St. Clair* obtained a Tack from *James V.* at 2000 *l.* yearly.

In 1565, *Queen Mary* made a Grant of these Islands to *Robert Stuart*, afterwards Earl of *Orkney*, for Payment of 2000 *l.* which Grant was confirmed by *James VI.* in the 1581; but after the Majority of *James VI.* in the 1587, *Robert Stuart* being in Disgrace, and his Right falling under the general Revocation, *Sir John Maitland* of *Thirlestane*, then Chancellor, and *Sir Ludovick Ballantyne*, Justice-Clerk, obtained a Grant of these Islands, and became bound to pay 109 *l.* 8 *s.* 1 *d.* in Money, 3001 *Meils* of Bear, 1535 *Meils* of Meal and Malt, 2281 *Meils* of Flesh, 24 *Barrels*, 6 *Lispunds* of Oil, 22 *Barrels*, 12 *Lispunds* of Butter: And besides this, they became bound to pay a separate Rent for *Zetland*.

At the Time of this Grant, *Robert Stuart* was not only in Disgrace, but had been committed Prisoner to the Palace of *Linlithgow*: He was restored, however, to Favour, soon after, and *Sir John Maitland*, and *Sir Ludovick Ballantyne*, were prevailed upon to make Resignation of their Right in the King's Hands, upon an affected Narrative, that they had sustained great Loss by the excessive Feu-duty; whereupon a new Grant was issued in favour of *Robert Stuart*, for Payment of 3110 Merks, and for this Feu-duty, he, and afterwards his Son, Earl *Patrick*, accounted till the 1606.

About the 1600, a Rental appears to have been made out by a private Hand, of which a Copy is found in the Exchequer, intitled, *Rentalis Orcadiæ pro rege et episcopo*; by which it appears, that the Quantities of Bear, Malt, &c. payable at that Time to the Earls



Earls of Orkney, were as considerable as at this Day. This Rental is referred to in the former Memorial.

In the 1614, Lord Ochiltree became Tacksman of these Islands, for Payment of 40,000 Merks, and a separate Duty of 1000 *l. Scots*, for the Customs and Imposts. This Lease does not include the Right of Admiralty.

In the 1622, Sir John Buchanan obtained a Tack, for Payment of 45,000 Merks, and it appears by Discharges registrate in Exchequer, that he accordingly made Payment of this Tack-duty.

In the Year 1624, George Hay of Kinfands became Tacksman at 40,000 Merks, and in 1629, William Dick became Tacksman at 35,733 *l. 6 s. 8 d.* and made regular Payment of that Tack-duty for several Years.

From this Recital it is evident, that the Pursuers proceed upon a gross Mistake, when they suppose, that the Rent of these Islands, immediately after they came into the Hands of the Crown, in the 1468, amounted to no more than 440 *l. Scots*. It is very true that the Crown, for a considerable Time, received no more than this Sum; but then the full Revenues of these Islands were enjoyed by others, by virtue of beneficial Grants. The first Instance, on Record, which discovers any thing that approaches to the real Amount of the Crown-rents of these Countries, is the Feu-duty undertaken to be paid by Sir John Maitland and Sir Ludovick Ballantyne. The next is, the Rental in Exchequer, *pro Rege & Episcopo*, made out about the 1600; and thereafter follow many different Leafes, which, though they must have been all within the real Amount of the Crown-rents, yet approach to it in some Measure. And the Defender does maintain, that the Revenue, arising from these Islands, at this Day, does not equal the Rental 1600, nor the Tack-duty which was for several Years paid by William Dick.

The Pursuers object to the Evidence against an Increase of the Rental 1600. Weights arising from the high Amount of the Rental 1600, in the first place, That when the Particulars in the Rental 1600 are calculated at the present Prices, altho' the Amount should come out the same as the Rent at present, it will not thence follow, that a *Meil*, in 1600, contained as great a Weight as it does at present, because the Number of *Meils* may be the same in both Rentals, and yet the Quantity it contained different. And, 2dly, they affirm, that when the Particulars in the two Rentals are compared, the present



sent Rental exceeds the other greatly, in the Number of Meils and Barrels.

In answer to the *first* of these Objections, the Defender has only to observe, that when the Meils in the Rental 1600, are calculated at the Price which a Meil is proved to have yielded about the 1600, the Amount of that Rental will considerably exceed the present Rental, in the same Manner as it does exceed it, by calculating these Meils at the present Rate: For, in Fact, the Prices in 1600 were not lower, at a Medium, than the Prices in our Times, abstracting from a few late Years of unusual Scarcity. By the Tacksman's Account of the Parish of *Sandwich*, 1612, lying in the Register-house, Meal is stated at 7 *l.* per Meil, and Malt at 5 *l.* 10 *s.* By a Decree of the Steward-court of *Orkney*, produced, dated 14th October 1617, in favours of *Thomas Swinton*, Proprietor of the Isle of *Damsiey*, against *Hugh Knarston* his Tenant, the Tenant is decerned for Delivery of certain Quantities of Meal and Malt, or, in case of Failzie, to pay 5 *l.* 6 *s.* 8 *d.* for ilk Meil of Meal, or 4 *l.* 13 *s.* 4 *d.* for ilk Meil of Malt, for the Years 1616 and 1617; and the Tenant is there appearing, and does not object to the Prices decerned for. By an Exchequer Record, in the Year 1626, one hundred and eight Meils Coist, is valued at 500 *l.* Scots, which is at the Rate of 4 *l.* 12 *s.* 6 *d.* per Meil; and many other Proofs to the same Purpose might be mentioned, by which it appears, that a Meil was, at a Medium, valued as high, about the Beginning of the last Century, as at present; which, besides, is also a Proof that the Quantity contained in a Meil has not been increased since that Period.

With regard to the Pursuers *second* Objection, as they have given in no State, by which the pretended Excess of the present Rental, above the Rental 1600, is proved; it is impossible for the Defender to detect the particular Mistakes they have fallen into in their Calculation; if they persist in their Averment, it will be necessary that they give in a particular State.

Wm. Dick's Tack, 1629. The Pursuers also object to the Proof, against an Increase of the Weights, arising from the high Tack-duty paid by *William Dick* for the 1629, and several subsequent Years: They contend, *first*, That the present gross Rental amounts to 3263 *l.* Sterling yearly, agreeable to their Appendix, Numb. I. And, *2dly*, they contend, That the Rent 1629 became so high, only because it included also the Profits arising from the Right of Admiralty, the Toll of Ships, the



the Customs and Imposts of Merchandize, and the Tenths and Excise of Herrings, &c.

With regard to the *first* Objection, the Defender has already shown, that the present gross Rent is extremely different from what the Pursuers pretend. And, *2dly*, As to the Profits arising from the Right of Admiralty, it is apparent, at first Sight, that as these were merely casual, they never could have induced *William Dick*, the Tackfman, to pay an additional Rent, upon account of that precarious Chance. The Pursuers mention a Toll of six Angels and a Dollar, as annexed to the Right of Admiralty, for every Ship that entered the Harbours of these Islands. But, in the first Place, it appears from the Records of Privy Council referred to, that this Duty was only payable for *Ground-leave and Water-leave*. And, *2dly*, Though it had been payable for every Ship which entered the Harbours of these Islands, it must have produced a very inconsiderable Revenue, considering the State of Trade in those Days. Further, this Toll could not be considered as falling under the Right of Admiralty, but was plainly a Branch of the Customs and Imposts, which comprehended also the Tenths and Assize of Herrings, &c. and with regard to the Amount of the whole Customs and Imposts, there is clear Evidence on Record, that they were usually set at no more than 1000 *l. Scots*. Thus Lord *Ochiltree's* Tack 1614, expressly bears a separate Tack-duty, for the Customs and Imposts within these Islands, of 1000 *l. Scots*. They were again set for the same Sum of 1000 *l.* 18th February, 1620, to *Hary Stuart*, and in the 1622 they were again set to Sir *John Buchanan*, for five Years, at 1600 Merks; and, accordingly, *William Dick's* Tack bears a separate Reddendo, besides the 35,733 *l. 6 s. 8 d.* of sixteen Pounds Weight of Bullion, which must have been on account of the Customs; and, therefore, this Argument against the pretended Increase of the Weights, arising from the great Extent of *William Dick's* Tack-duty in 1629, remains unanswerable, and the Pursuers will, for ever, struggle in vain to overturn it. It is unnecessary, therefore, to follow the Pursuers in their Observations upon the later Leases of these Islands, from the 1671 downwards; which are also so many invincible Proofs that the Weights have not been increased.

The Pursuers have endeavoured by all the Arts of Exaggeration, to impress your Lordships with an Opinion “ that two third Parts of the whole Heritages in these Islands have been seized upon, *bre- vi manu*, by the Superior, because unable, by the Increase of the

Heritors who  
have surren-  
dered their  
Feus.



“Weights, to pay the Crown Rents; that others have been offered  
 “up by the Owners on the same account, in order to be relieved of  
 “the Rent, but without being able to obtain that Favour, the Sur-  
 “plus beyond the Produce of the Lands being made a Debt against  
 “the Persons and other Estates of the Proprietors: That to this  
 “Cause it is to be intputed that the Number of Heritors has been re-  
 “duced within these hundred Years from 776 to 245.”

When your Lordships are informed of the true State of the Fact, those overstrained Exaggerations will retort upon the Pursuers themselves.

Out of the 531 Heritors, who, the Pursuers inform your Lordships, have been swallowed up by the Superior since the 5th December 1660, the Family of Morton has come in the Place of no more than the following eight, viz.

*James Pottinger in Deerness,*

— *Forstomburster,*

*Robert Nicolson's Heirs in Hara,*

*Helen Hall in Firth,*

*David Grimbister there,*

— *Randall in Westray,*

*Edward and Thomas Coarfes in Rousay, and*

*John Dennison in Leyland in Sanday.*

The total yearly Rent, arising to the Defender from these eight Heritages, does not amount to 300 *l. Scots*, reckoning the Victual, &c. at the common Conversions, and the Cess which the Earl pays for these Heritages, amounts to 14 *l. 7s. 5d. Scots*, yearly. The Receipt of Cess referred to by the Pursuers (Page 24th of their Memorial) includes the Cess of the Lands of *Northwall*, of about 1000 *l. Scots* of yearly Rent, purchased by the Defender from Mr. *Hamilton of Olivestob*.

If it had been true that many Heritages had fallen to the Superior for not Payment of the Feu-duties, this would have been far from proving an Increase of the Weights. A great Part of the Crownlands were anciently feued out in small Parcels, and at the full Rent; so that it required the utmost Industry and Frugality upon the Part of the Feuers to pay the Feu-duty, and maintain their Families, out of the Produce of the Heritage. Any Negligence in the Culture of the Ground, or Extravagance in their Manner of Living, must have necessarily run them into Arrear, and of course obliged them to surrender their Feus. But had such an Increase as is alledged by the



Abstract of my Lord's  
year last past, according

1754.

Accounts, f. 1.

|                  |         |
|------------------|---------|
| South. Ronaldsha | £ 3696. |
| Burra            | 1962.   |
| Flotta           | 595.    |
| Swinna           | 172.    |

1755

Accounts, f. 4

|                  |              |
|------------------|--------------|
| South. Ronaldsha | 3959. 9.     |
| Burra            | 2543. 5.     |
| Flotta           | 2865. 17. 4. |
| Swinna           | 185. 4.      |

1756.

Accounts, f. 9

|                  |             |
|------------------|-------------|
| South. Ronaldsha | 3965. 3.    |
| Burra            | 2159. 0.    |
| Flotta           | 806. 17. 0. |
| Swinna           | 185. 4.     |

1757.

Accounts, f. 12

|                  |              |
|------------------|--------------|
| South. Ronaldsha | 3701. 17. 4. |
| Burra            | 1714. 16. 4. |
| Flotta           | 674. 7. 6.   |
| Swinna           | 185. 4.      |

1758.

Accounts, f. 15

|                  |              |
|------------------|--------------|
| South. Ronaldsha | 3701. 17. 5. |
| Burra            | 1715. 16. 4. |
| Flotta           | 674. 7. 6.   |
| Swinna           | 185. 4.      |

1759

Accounts, f. 18

|                  |              |
|------------------|--------------|
| South. Ronaldsha | 3701. 17. 5. |
| Burra            | 1717. 16. 4. |
| Flotta           | 700. 8. 9.   |
| Swinna           |              |







the Pursuers happened in the Weights, it must infallibly have occasioned the Forfeiture of almost every Feu in the Country. That so few Instances of this Sort have happened, is a full Proof that there has been no Increase in the Weights. And it is indeed surprizing, that without any Increase of the Weights, so few Instances have occurred. Even with regard to the eight Feus above mentioned, the Cause of their falling to the Superior is fully accounted for by the Pursuers 45th Witness, State of the Process, p. 140. F. and 145. F. viz. that these were small Feus, which had been granted by Douglas of Spynie during the Years of his Chamberlainrie, soon after the Restoration, which had been feued out at too high a Rate; and this Witness expressly contradicts the injurious Alledgeance, that any Man's Feu had been seized upon, *brevi manu*. His Words are, "That when Lands in Orkney fell in Arrear to the Superior, (by which he says he means the Lands feued by Spynie only) there was personal Diligence done against the Feuers by Decrees, Hornings and Captions, for their bygone Rents, and they thereupon voluntarily gave up the Feus, which, they alledge, was not able to pay up the Feu-rent; and when that happened to be the Case, such Land was marked upon the Margin of the Rental, fallen to the Superior for Debt."

There is no other Pretext for alledging that any Person has been constrained to keep a Feu which was unable to pay the Rent, but this, that the Lands of Breckaskail, which do not pay above 20 l. 19 s. Scots of Feu-duty, happened some Years ago to suffer considerably, by over-blowing of ~~Land~~, the Feuer imagining that they had become unable to pay the Feu-duty, delivered a Petition two Years ago to the Defender's Factor, as he is now informed, to be presented to the Defender, for having the Feu-duty lessened, or to be relieved of the Lands; which is the only Instance that has happened for 20 Years past, and it is believed that this Feuer, who has no other Estate, intends only to insist upon the first Prayer of his Petition, and would not surrender his Feu if he were seriously asked to do it.

That the Number of small Heritors have decreased in Orkney, is not to be wondered at; it is the natural Effect of the Introduction of expensive Living into any Country; the smaller Heritors are ruined by the Expence, and their Heritages are purchased by those who are more frugal, or from the Extent of their Fortune more able, to support the fashionable Extravagance.

The



Ancient  
Weights in  
Orkney.

The Pursuers, in their Arrangement of their Proofs, have begun with a Research into Antiquity, in order to shew that the Laws and Customs of *Norway*, took Place in *Orkney*, and that the same Customs continued after the Mortgage of these Islands, to the Kings of *Scotland*: That the weighing Instruments *Pundar* and *Bysmar*, and the Names of the Weights taken upon them, are, and have been, the same in *Norway* as in *Orkney*, and that therefore the Contents of the Weights in *Orkney*, should now be reduced to the present Weights of *Norway*.

The Defender apprehends it is altogether immaterial in the present Question, what are the Weights in *Norway*, or what might have been the Weights in *Orkney*, in the remotest Periods of Antiquity. The Weights which have immemorially subsisted there unvaried, will undoubtedly be the Rule in the present Dispute, without regard to the Pursuers Conjectures, with whatever Degree of Evidence they may be attended: But the Defender cannot help observing, that besides many other Objections which may be offered to the Proofs referred to, of an ancient Conformity in the Customs of *Norway* and of *Orkney*, the Conclusions which the Pursuers would draw from thence, with respect to the Weights antiently used in these Islands, which is Conjecture only at best, is entirely overturned by this single Consideration, That the Islands of *Orkney* and *Zetland*, were not from the earliest Times subject to the Crown of *Norway*, but were only conquered about the Year 875. Before the Conquest, the Inhabitants of these Islands must undoubtedly have had the Use of Weights, and very probably used the weighing Instruments of *Pundars* and *Bysmars*, which are the simplest and least complicated Invention for this Purpose, and are accordingly used at this Day in many remote Countries of the World. If the Inhabitants of *Orkney* had the Use of these Weights before the Conquest, it is impossible to doubt, that after the Conquest, they would continue the Use of the same Weights and weighing Instruments, to which they had been accustomed; for it has been found, by the Experience of all Times and Ages, to be next to impossible to bring the Inhabitants of any Country or District, to the Use of other Weights than those with which they have been formerly acquainted: Nor is it to be supposed, that the *Norwegian* Kings, in those rude Times, would take any Pains to regulate this Branch of Police. That there may have been used at the same time, in *Norway* and *Denmark*, similar Instruments to those which were known in  
Orkney,



*Orkney*, but giving quite different Weights, is extremely possible; and when by the Conquest the *Norwegian* Language came to be in common Use in these Islands: It is also very possible, that the *Norwegian* Names may have been applied to some of the Weights in *Orkney*, which did not however correspond in Quantity to the Weights expressed by the same Denomination in *Norway*.

This Supposition destroys the whole of the Pursuers Theory, and that it is agreeable to the real Fact, appears highly probable on many Accounts: For though it may be true, that the weighing Instruments in both Countries go by the same Names, yet it is certain, that the Denominations of the Weights, taken upon these Instruments, differ extremely: For 1<sup>st</sup>, There is no such Denomination of Weight known in *Norway*, as a *Meit*, neither do they understand what is meant by the Term *Setteen*: The Term *Last*, in *Norway*, is an Expression never applied to what is weighed upon the *Pundar*, but only denotes the Number in Barrels: The Term *Lispund*, in *Norway*, denotes 16 lib. Weight: And the Term *Pund*, or *Bysmar-pund*, which the Pursuers would have to be synonymous with the *Norway* and *Orkney Lispund*, is a Weight entirely different in *Norway*, from the *Lispund* known there: The weighing Instrument called *Bysmar* in *Norway*, is capable of weighing three *Bysmar-punds*, but the *Lispund* of *Orkney* (for they never use the Term *Bysmar-pund*,) denotes the utmost Weight that can be weighed upon the *Bysmar*; and on the other hand, the utmost Weight that can be weighed upon the *Bysmar* in *Norway*, is called a *Vog*.

It thus appears, that the Diversity of the Names and Quantities of Weight, which are taken upon the *Pundar* and *Bysmar* in these two Countries is so great, that it is impossible to suppose, that the one Country can have derived its Weights from the other; but it is easy to conceive how the Term *Lispund* may have been borrowed from *Norway*, and applied as a synonymous Expression to that Weight in *Orkney*, which was before denominated a *Setteen*, though different in Weight from a *Norway Lispund*, or how the *Norway* Term *Mark*, might be used to signify in *Orkney*, a Weight totally different from a *Norway Mark*, on this single Account, that in both Countries this was the lowest Weight which could be taken upon the *Bysmar*. In like Manner, the Term *Ounce*, or *Ure-land*, though probably borrowed from *Norway*, has in *Orkney* quite a different Signification to what it has in *Norway*, as is proved by the Inscription of the Rental 1600.



This Supposition is also rendered probable, because it relieves from all those Absurdities, and improbable Inferences which necessarily follow from supposing, with the Pursuers, that the present Weights of *Norway* were at some distant Period, the established Weights of *Orkney*.

The Defender has no Occasion to examine the Proofs which the Pursuers have stated, with regard to the antient or present Weight of a *Mark* in *Norway*; But what is said, with regard to the Relation there, and in other Countries of *Europe*, between a *Mark* and an Ounce, that the one is always eight times contained in the other, neither proves, that a *Mark* is every where of the same Weight; for the *Ounce* weighs differently in almost every Country, nor can be of any Force in the present Question; for it is allowed on all hands, that a *Mark* is the lowest Weight, which in *Orkney* can be taken upon the *Bysmar*, which is the Case also in *Norway*; and upon this Account alone, the Term *Mark* appears to have been borrowed from the *Norwegian* Language, and applied to it without any Regard to the real Weight which it contained in Comparison of the *Norwegian Mark*.

The Defender shall not add to the Length of this Paper, by running over the whole laborious Arrangement which the Pursuers have given of their Proof. The two great Hinges upon which the whole of it turns, is a supposed Relation between the *Lispund* and the *Barrel*, which they pretend to have varied at different Times, by a gradual Increase of the *Lispund*. And, 2dly, a variable Relation which they attempt to prove between the *Orkney Meil* and the *Scots Boll*, which Variations, they say, corresponded with the gradual Increase of the *Lispund*.

Pretended  
Relation be-  
tween the  
*Lispund* and  
*Barrel*.

The Conversion of *Lispunds* into *Barrels*, in ancient Writings, has been already shown by the Defender, in his Memorial, to have been merely conjectural, and it is conjectural, even at this Day; for the Defender still allows his Factor to account at the Rate of eight *Lispunds* to the *Barrel*, and has done so for above forty Years back, though the *Barrel* cannot, nor never could, contain so much.

The Averments of the Pursuers upon this Subject, when collected together in one View, betray their own Absurdity. From the 1569 to 1584, the *Lispund*, say they, increased from 12 to 15 *Punds*; from the 1584 till about the 1600, it increased from 15 to 18 *Punds*; but from the 1600 to the 1712, they admit, that the same Number of *Lispunds*, viz. ten, were regularly allowed to the *Barrel*,



*Barrel*, and therefore the *Lispund*, according to the Pursuers Plan, must have continued the same; but they tell your Lordships, that, during this Period, it returned from 18 to 16 *Punds*, and then mounted to 18 *Punds* again; and that, from the 1712, it has gradually mounted to 30 *Punds*, and yet eight *Lispunds* have been uniformly allowed to the *Barrel*, during this last Period.

The first prodigious Change which the Pursuers pretend to have happened in the Weight of the *Lispund*, must, therefore, have arisen between the 1569 and 1600, that is, in the Space of no more than 30 Years, and this Change too, not a private surreptitious Matter, but universally known over the Country, and made the publick Rule of accounting, and of converting *Lispunds* into *Barrels*; and yet, in all the Complaints against *Robert* and *Patrick* Earls of *Orkney*, not the smallest Complaint made of this open, avowed, and enormous Extortion. According to the Pursuers own Argument, this Increase of the Weight must have been perceptible to every Inhabitant of the Country; for they affirm, that the *Barrel* continued uniformly the same, while the *Lispund* was increased, by which they acknowledge, that there was, in the Hands of every Person in the Country, a Vessel of a known Capacity, with which they could compare the *Lispund* of Butter, from time to time, and discover, with some Degree of Accuracy, the Extent of its Increase; nay, they acknowledge, that the Increase was actually observed, and, upon that Account alone, the Number of *Lispunds* allowed to the *Barrel* was varied. This Argument refutes itself; nor is it easy to conceive why the Earls of *Orkney*, if they had Power or Influence sufficient to alter the Weight of the *Lispund*, should have allowed the *Barrel* to remain unvaried, when so considerable a Quantity of Butter (more than Half of the whole Butter Rent) was payable to them in *Barrels*; so that the adding to its Capacity must have greatly augmented their Revenue, and would, at the same time, have rendered the Increase of the *Lispund*, and other Weights, more difficult to be discovered.

With regard to the variable Relation which the Pursuers pretend to have proved, between the *Meil* and the *Scots Boll*, corresponding, as they say, to the gradual Increase of the Weights; a few general Observations will be sufficient to show, that this Argument is altogether inconclusive.

For, besides that the Facts upon which the Pursuers proceed are mis-stated, and their Calculations erroneous, their Argument proceeds

Pretended  
Relation be-  
tween the  
Meil and  
Scots Boll.



ceeds upon a Comparison of the Weight of Grain in one Country, with the Measure of it in another Country, and that too at different Periods, from which nothing but the most vague Conjecture can arise.

The Measure of a Boll filled with Wooll, Feathers, or any other light Commodity, will weigh but a few Stones, and a *Meil* Weight of these Commodities will, of course, fill several Boll Measures; the Full of a Boll in Meal will not weigh the Half of what the Full of the same Measure will weigh in sound Wheat; a Boll of Malt will weigh less than a Boll of Bear, and a Boll of Bear than a Boll of Wheat; a Boll of Bear from one Field, will greatly outweigh a Boll from a different Field; and the Weight of the Boll of Grain produced upon the same Field, will weigh very differently in different Years: These are Facts well known, and from thence it must appear to your Lordships, that nothing can be more uncertain, than the Attempt to fix and ascertain the Weight of a *Meil*, at a distant Period, by comparing it with the Measure of a Boll, when the Commodity weighed and measured is Grain, which varies in its Weight in so many different Ways.

The best *Orkney* Grain is of a very inferior Quality to that which usually grows in the fertile Counties of *Scotland*; a Boll of *Orkney* Bear will sometimes weigh no more than 14 Stone, whereas a Boll of *East Lothian* Bear will usually weigh 19 Stone, and, of course, a *Meil* of *East Lothian* Barley will measure little more than half a Boll, whereas a *Meil* of *Orkney* Bear will measure near three Fourths of a Boll, and a *Meil* of Malt, or a *Meil* of *Coist* will measure a whole Boll.

Regulation of  
Weights in  
Zetland,  
1691.

The Pursuers make frequent Mention of an Act passed by *Elphinston* of *Lopness*, in the Year 1691, regulating the Weights in *Zetland*, and appointing that the *Lispund* should be considered as of 24 *Punds*, which they represent as an Attempt, upon his Part, to increase the Weights, and that he had made Choice of that remote Country to begin this Oppression.

The Fact is, that *Elphinston* of *Lopness* was a Gentleman quite unacquainted with Business, having been bred in the Army, and is designed in the Act, Colonel *Robert Elphinston*; and it is very plain, from all the Circumstances of that Affair, that the Gentlemen of *Zetland* took Advantage of his Ignorance, in order to fix the Weight of the *Lispund* below what they knew to be its real Weight.

*Lopness*



*Lopness* was neither Farmer nor Grantee of these Islands, he only acted as interim Chamberlain for the Crown; he had therefore no Interest whatsoever to make an Attempt for increasing the Weights, and, if he had meant to increase them, he employed a very extraordinary Method; for it appears that his Act, relative to the Weights, was made with the Concurrence of no less than five of the Heritors of the County, and many other of the principal Inhabitants, who must all have had an evident Interest to oppose the Increase of the Weights.

The Pursuers have in like manner taken frequent Occasion to mention an Act made by *Andrew Ross* in 1738, ascertaining the *Lispund* in *Zetland* to be 28 Pounds; but when the Facts relating to that Act are considered, the Argument will turn strongly against the Pursuers.

Mr. *Giffard* of *Busta*, who is the principal Heritor in *Zetland*, was at that Time conjunct Steward-depute for *Zetland*. The Regulation made at that Time proceeded upon the Application of the Heritors and Inhabitants themselves. Mr. *Giffard* of *Busta* acted as a Magistrate in the solemn Trial and Examination, which was at that Time made with regard to the real Medium-weight of a *Lispund*, and that Trial was witnessed by the principal Heritors of the Island. The Inhabitants of *Zetland* have ever since paid their Rents agreeable to this Regulation without Murmur or Complaint, and none of them have lent their Names to the present Process, although there is little Reason to doubt that they have been strongly solicited to take part in it.

Further, it appears by the Proof which has been taken in this Process, that the Medium-weight of a *Meil* is considerably higher in *Orkney* than answers to 28 Pound to the *Lispund*, or 168 Pounds to the *Meil*, established as the Rule in *Zetland*. For the Witnesses prove, (as is acknowledged by the Pursuers, in their Memorial, p. 47.) "That the least Weight of a *Meil*, as far back as they remember, has been 10½ Stones, and the greatest Weight 12 Stones, which makes the Medium-weight of a *Meil* 11½ Stones," which is exactly equal to 180 Pounds, or to six *Lispunds* of 30 *libs* each. The Pursuers, in their Memorial, (p. 47.) have committed a very palpable Mistake, in supposing that 11½ Stones is no more than 90 *libs*, upon which Supposition they have built the following Argument: "A *Meil*, say they, originally was but 72 *libs*;" the Defender's Proof brings it to 90 *libs*, and his Lordship's Sub-

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“stitute advanced it to 168 *lbs*, which makes it twice as much  
 “as at first, and a third Part more.” It will be evident to your  
 Lordships with how much Force this Argument retorts upon the  
 Pursuers themselves.

Lead run into  
 the Weights.

The Pursuers, in order calumniate and create an Impression, have  
 laid hold of a vague hearsay Tale, that *James Earl of Morton* had  
 ordered Lead to be run into the Weights, thereby to increase the  
 Standard. The thing is in itself incredible: The Standards are now  
 produced in Court. They are proved to be the very same which  
 were used in the 1686, and before that Period; and none of them  
 have Lead run into them, except the one *Mark Weight*, which is  
 none of those in the List 1686, and is still exactly in Proportion  
 with the four *Mark Weight*, (the Authenticity of which is fully esta-  
 blished) as will appear by the Weights of each in Pounds and Ounces,  
 (State of the Process, p. 47.) And accordingly *Thomas Aitken's*  
 hearsay Alledgeance with regard to this Matter, as deposed to by  
*Robert Aitken*, the Pursuers 15th Witness, (State of the Process,  
 p. 114. B.) relates only to the one *Mark Weight*. Depones, “that  
 “he heard his Father say some Time ago in the old Tolbooth  
 “of *Kirkwall*, that *William Tait*, Wright, who was his Father's  
 “Predecessor in Office, had told him *Thomas Aitken*, that he *Wil-*  
 “*liam Tait* had run in Lead into the one *Mark Weight*, which is  
 “a Bone Tooth of some Beast; and this he heard his Father say  
 “about the Time that the Weights were examined in *Kirkwall*,  
 “when there were several Gentlemen present.” It is evident that,  
 supposing this Hearsay to have been true, and that Lead had been  
 actually run into the one *Mark Weight*, by Order of *James Earl of*  
*Morton*, yet this could never alter the Weights in general, unless the  
 other Standards had been altered in Proportion, seeing the one *Mark*  
*Weight* is at this Day in due Proportion with the others.

The Pursuers seem to rest their chief Proof of the prodigious In-  
 crease which they say happened on the Weights after the 1712,  
 upon the Oath of *George Traill of Hobister*, and the apparent Marks  
 of Alteration which are visible upon the *Pundars* and *Bysmars* pro-  
 duced in Court.

Hobister's E-  
 vidence.

With regard to *Traill of Hobister's* Oath, he indeed swears, that  
 “since he the Deponent, was appointed Chamberlain, (which was in  
 “the Year 1712) he has always heard an universal and yearly Complaint  
 “of the continued Increase of *Pundars* and *Bysmars*, not only of Lord  
 “*Morton's Pundars* and *Bysmars*, but of these made use of by the Vas-  
 “sals



“ fals and Tenants, of the Country.” But, besides that he stands alone in this Alledgeance of an universal Outcry against the Weights as far back as the 1712, he himself adds, “ that he believes this Outcry was owing to the Ignorance of the common Maker and Adjuster of the Instruments and alledged Standards, whereby he makes and adjusts *Pundars* and *Bysmars*.”

But further, there will be found no Difficulty, after considering another Part of his Oath, to account for the Diversity which appears in his Account of this Matter, from that of all the other oldest Witnesses. Depones “ that he does not contribute one Farthing towards the carrying on the present Process, and that he came under no Engagement to advance Money for carrying on the said Process, *further than to advance Money for his Son, and that he came under that Engagement when the said Process commenced*, which he thinks was about 1744 or 1745, and that he came under no Engagement himself to carry on any Process against the Defendant; that he pays no Money himself for carrying on the said Process, *but gives his Son a Bill on Edinburgh therefor*.”

State of the  
Process, p.  
147.

What this Witness may possibly have had in View, and judged to be sufficient to justify him, when he deponed in such strong and general Terms, that he had heard an *universal and yearly Complaint*, since the 1712, may have been some particular Complaints or Disputes, which, no doubt, must have happened at different Times, with regard to particular *Pundars*: And it is not at all impossible, that this Witness himself, while he was Chamberlain, may have given occasion to all or many of these particular Complaints, by using *Pundars* of greater Weight than the just Standard, by which his own Fortune perhaps, and not that of his Constituent, was increased. But, whatever may be in this, it is impossible for your Lordships to believe, that there either was such an universal Complaint, as he affirms, or that there was any real Ground for it.

With regard to the visible Marks of repeated Changes, which are observable upon the *Pundars* and *Bysmars* produced, these afford no Sort of Evidence, that the Weights in general have been increased over the Country, new *Pundars* come very soon to require Adjustment, either by the Fraud or Negligence of the Possessors; and, in general, they were never brought in to be adjusted, till found to differ from other *Pundars* in the Neighbourhood. Sometimes indeed the Assayer, in order to create himself a Job, is proved to have

perswaded



perswaded People, that their *Pundars* required Adjustment; and upon all these Occasions, in order to magnify his own Performance, so as he might be intitled to a greater Hire, he, no doubt, industriously left visible Marks of the Changes he had made: But this is far from proving, that the Weight upon any of these *Pundars* was really increased, beyond what it had been at their original Construction. The Acts which the Pursuers refer to, ordering all *Pundars* to be sent in and adjusted, were not Acts made by the Defender or his Predecessors, but by the Country Gentlemen themselves, who cannot be supposed to have persisted in renewing such Orders, if they had ever discovered or suspected, that the Weights in general had by that Means been gradually augmented.

Upon this Subject the Defender must beg leave to take notice of an Appeal, which the Pursuers have made, with much Confidence, to one particular *Pundar* produced in Court, marked with the initial Letters P.<sup>E</sup> O. as an unexceptionable and decisive Proof, on their Side, of the Augmentation of the Weight; the Axis, they say, of this *Pundar*, has been considerably extended on the short Arm, particularly of late: But, let the Axis be brought back to the Point it occupied in the Time of Earl *Patrick*, when it was made, and it will be found, that the *Lispund* then was equal to 18 Pounds.

It is true, that in this *Pundar*, as in many of the others produced, the Axis has been extended on the short Arm; and this always becomes necessary, when the short Arm, by Design, Accident, Length of Time, or bad Usage, is rendered lighter: But the Pursuers affirm, with rather too much Confidence, that if the Axis of this *Pundar* were removed to where it stood, the *Lispund* would be found to be 18 Pounds, since it is impossible that that can be known, till the Axis is actually removed. But if, upon Trial, the Pursuers Conjecture should be found to hold true, yet this would not prove, that when the *Pundar* was first made, and the Axis stood in its first Place, it then answered to a *Lispund* of 18 Pound; for, if the Wood of the Beam has, in the Space of 160 Years, lost of its original Weight, by the natural Waste of Time, by Wearing, or by Diminutions, at either End, or in the Thickness, upon occasion of the several Adjustments it has undergone, then it is impossible, that when the Axis is fixed at its original Place, the *Pundar* will answer to the same Weight, as when it was first made; and if it should answer to 18 Pound now, this would afford almost a certain Proof against the Pursuers, that it did not answer to 18 Pound when new.

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The Pursuers inform your Lordships, " That they had called for those notable *Pundars*, denominated King's Weights, but could not obtain them, the Defender's Servants having not only refused to comply, but cautiously declined to exhibite any *Pundar* or *Bysmar* at all."

This is a very improper Gloss upon the Fact, as it appears from the Proof: The Pursuers called for Exhibition, from the Defender's Girnel-keeper, of the *Malt-pundar* and *Bear-pundar*, used by him in the Store-house, for receiving the Superior's Duties? His Answer was, " That he had daily and immediate Use for the *Malt-pundar*, State of Pro-  
" called for; that therefore he would not exhibite it, nor the other cess, p. 170.  
" *Pundar*, which he might soon have Occasion to use; but added, H.  
" that the Commissioners, who took the Proof at the Sight of the  
" Managers for the Pursuers, were welcome, not only to see these  
" *Pundars*, in the Store-house, or where the Commissioners then  
" were met, but also to make such Tryals or Experiments with  
" them, as the Commissioners should think proper."—— Had the  
Pursuers expected to make any Discovery from these *Pundars*, they  
would not have saved themselves the Trouble of a most strict Ex-  
amination; the Result of which would have been carefully certified  
by the Commissioners, and transmitted hither, with the Report.

The Pursuers are guilty of another Piece of Grimace, expressed in Terms not a little indecent; the Words of their Memorial, p. 35, are these: " Much in the same Way, the Defender *endeavours*  
" to *mislead* in another Matter. The Pursuers in their Condescen-  
" dence, State of the Process, p. 18, called for the principal Mi-  
" nutes, or Sederunts, of the Landed-interest, conveyed by his  
" Authority in the 1743, which the Defender, who was then in  
" Orkney, had borrowed for his own Perusal, but never returned.  
" In place of these Sederunts of that Meeting 1743, he produces  
" the Copy of a quite different Paper, intituled, *Proceedings of the*  
" *Steward Court of Orkney, in the Years 1740 and 1744*. This Pa-  
" per of his own, he *misrepresents* as the one called for by the Pur-  
" suers, and then draws Inferences from it, as a Document appeal-  
" ed to by them, State of the Process, p. 35, H. p. 82, F."

This high Charge, expressed in such unusual Terms, has no other Foundation than this, the Sederunts of the Meeting of the Landed-interest 1743, by some Neglect, had not been sent to Town, and the Defender's Lawyer having never seen it, happened, in the written Debate before the Lord Ordinary, to mistake the Proceedings of



the Steward-court 1743, for the Paper called for by the Pursuers: A Mistake which was extremely harmless, and neither could serve the Defender, nor injure the Pursuers. There never was any Intention to keep up the Minutes of the Meeting of the Landed-interest 1743, neither did the Pursuers themselves, in the Execution of the Act and Commission, think it worth their while to call for these Minutes of the Landed-interest, which, however, are now produced.

The Defender cannot, without swelling this Paper to a still more unreasonable Bulk, take Notice of every thing, which, in the Pursuers Memorial, has been mis-stated or exaggerated; some Particulars, however, still remain, which he cannot allow to pass unobserved.

Iron Steel-  
yard.

The Pursuers have affirmed, " That the *Iron-steelyard*, which was  
" exhibited to the Meeting 1743, and is now in Court, appears,  
" by Inspection, to have been altered in its Weights: The old Di-  
" visions, together with the new, being still extant on the larger  
" Arm; that *Thomas Aitken*, when judicially examined, in Presence of  
" the Meeting, discovered by what Means, and by whose Autho-  
" rity, the Thing had happened, particularly, that his Predecessor  
" and Master, the former Assayer, had corrupted the Weights in  
" Use about the Year 1712, by putting Lead into it, which suffi-  
" ciently accounted for his altering the Divisions of the *Steelyard*  
" that belonged to it," and they refer to a written Report made to  
the Meeting 1743, and now produced, relating to the present  
Weight, &c. of the *Iron-steelyard*.

These positive Averments will appear to your Lordships in a pretty extraordinary Light, when the true Fact is known. After the most careful Inspection, it is impossible to discover upon the *Iron-steelyard*, any Marks whatever, either old or new; neither does the Report, to which the Pursuers refer, make the least mention of new Marks upon that *Steelyard*; and with regard to the pretended old Marks, the Words of the Report are these, " The *Steelyard* being in Equi-  
" librium, we took Notice of the three old Marks *that you mentioned*  
" *in yours*." But these old Marks are so much the Children of Imagination, that the Person, who, by your Lordships Authority, was employed to make an exact Copy, or Exemplification of the *Iron-yard*, was not able to discover these Marks, and accordingly, none are to be found on the new *Steelyard*. The Defender does again affirm, that no other Marks are to be found upon the old Stan-  
dard



dard, than such Cracks or Dimples as are to be observed, on every Piece of rusty Iron.

But it is unpardonable in the Pursuers, to mingle and twist this groundless Conceit of theirs, with the Tale of Lead run into the Weights. The only one of the Standards produced, into which Lead is run, is the one *Mark Weight*: This is a Weight, which has no Relation to the *Iron-steelyard*, but only corresponds to the *Byf-mar*; and therefore, no Addition to it could require an Alteration upon the *Iron-steelyard*. Your Lordships will farther observe, that the Pursuers Alledgeance is, that, by altering the old Marks upon the long Arm of the *Iron-steelyard*, it was made to correspond to a greater Weight: But this from the very Nature of the Instrument, is mathematically impossible, unless the Axis of Motion had been shifted towards the short Arm, which the Pursuers cannot alledge; for if that had been done, the Marks of the Change would have still remained upon the *Steelyard*.

The Case is, that the Pursuers found themselves puzzled to account for the Use of the sixteen Pound of Brass, mentioned in the Act 1663; and, because that Weight, they found, could never correspond to the Steelyard, as it now stands, they thought it necessary, therefore, to suppose, that the Steelyard must have been altered: But this Mystery may be easily unravelled; sixteen Pound Weight of Brass, joined to the four *Marks Weight*, does, at present bring the Iron Steelyard to an Equilibrium, and must have answered, in the same Manner, in the 1663. This Steelyard appears, in fact, to be no other than a *Bear-pundar*, and might serve also as a Standard for the *Malt-pundar*, by adding, to the *Pundars* made from it, one Third in the several Weights and Proportions; and, accordingly, your Lordships will observe, that in the Act 28th *January* 1662, above recited, the Gentlemen of *Orkney* ordered the *Pundars* to be adjusted conform to the *Iron Standard*; but, in the same Act, when they come to give more particular Directions, they order, that the *Pundars* shall be made, in every thing, conform to *Lord Morton's Pundar* in the New-house: This not only proves, that *Lord Morton's Pundar*, at the Time, agreed in its Proportions with the Iron Standard, but further, that it was an exact Model for the *Malt-pundar*, whereas the Iron Steelyard was only a Standard from which, by Calculation, a *Malt-pundar* could be made,

The Defender shall take notice of one other Observation in the Pursuers Memorial, which is expressed in Terms a little particular.  
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The Defender has all along affirmed, that the Practice of computing 10 *Lispunds* to the *Barrel*, in former Times (and in three Instances referred to by the Pursuers, 15 *Lispunds*) was not because the *Barrel* could hold so much, but the Surplus was allowed to the Factor for Boat-freight, and other Charges in receiving and packing the Butter.

In answer to this the Pursuers observe, that from thence it would follow, that out of every 15 *Lispunds*, or 15 *Barrels* which the Factor received, 9 of them were allowed to himself. 2dly, That it is proved by the Defender's Factors Accounts, and by the Oath of *George Traill*, that the Boat-freight, and other Charges in receiving the Butter, were never sustained by the Factors, but by their Constituents; and, 3dly, That this Witness swears he allowed to others the same Number of *Lispunds*, for every *Barrel*, as was allowed to himself; *that these exactly filled the Barrel, and there was no Overplus*: To which Argument the Pursuers subjoin the following Remark, "It would have shortened this Process greatly, and prevented much Trouble to the Court, as well as to the Pursuers, if the Defender had been pleased to confine his Assertions to Evidence, or, at least, not to assert so positively what he had sufficient Evidence in his own Hand to confute."

The Defender finds it difficult to account for this Peculiarity of Expression, unless the Pursuers think themselves justified by the Proverb, that *losing Gamesters are allowed to rail*, he hopes, however, to satisfy your Lordships, that the Infination is altogether unjust.

The Defender's present Factor is allowed 8 *Lispunds* to the *Barrel* (the same Number which was allowed to *Hobister*) and he has no further Allowance for Boat-freight, Charges of collecting or packing the Butter, nor for the Trouble attending it. From *Hobister's* Accounts it appears, that he was allowed 12 *l. Scots* yearly for Boat-freight, but had no Allowance for any other Expence either for the collecting or packing the Butter, though in so considerable a Quantity, both the Trouble and Expence must have been great. The Defender, when he affirmed that his Factor, upon account of the Allowance of 8 *Lispunds*, was at the Trouble and Expence of collecting the Butter, told your Lordships what he knew to have been the Method of accounting, ever since he succeeded to these Islands; he did not suppose, that the Method of accounting with former Factors, had differed in the least, and therefore did not cause  
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examine their Accounts with this View ; but, when they are examined, it appears that the Difference is altogether trifling, and does not, in the least, vary the Argument.

With regard to what the Pursuers favourite Witness, *Traill of Hobister*, depones, That it took 8 *Lispunds* to fill the *Barrel*, and there was no Overplus, this admits of a clear Refutation from his own Oath, for he depones, That others willingly delivered a *Barrel* in place of 8 *Lispunds*, and he allowed them at that Rate ; and thus, by his Account of the Matter, the Feuers were at the Expence of the *Barrel* and Trouble of Package, and yet had no Advantage by the Bargain, but actually packed into the *Barrel* the whole 8 *Lispunds* allowed.

The Absurdity which the Pursuers say would follow, from supposing that the Factor was allowed to pocket the Value of 9 *Barrels* out of every 15, admits of this Answer, that there is no Evidence that, at any Period of Time, more than 10 *Lispunds* were allowed to the *Barrel*, excepting the three solitary Instances which the Pursuers have referred to, in the Accounts of Thirds of Benefices, and the vague Computation, in a single Charter *anno* 1584, where 12 *Lispunds* are computed to the *Barrel*. The Evidence arising from the three Instances in the Accounts of Thirds, is overturned by an Entry in the same Accounts for the Year 1561, by which 7  $\frac{3}{4}$  *Lispunds* are computed to the *Barrel*. That the Computation of 15 *Lispunds* in the Pursuers three Instances from these Accounts, only regarded the odd *Lispunds* and Fractions of a *Barrel* there stated, and was not the Rule with regard to the whole loose *Lispunds* collected and accounted for appears demonstrable from this Circumstance, that though these Accounts of the Thirds of Benefices, are continued down to the Year 1590, yet the Accountant never charges himself with a single *Barrel* of more Butter for *Orkney*, than in the three Accounts referred to by the Pursuers, but they themselves acknowledge, that much less than 15 were sufficient to fill a *Barrel* towards the End of that Period, and, consequently, more *Barrels* ought to have been accounted for ; and, indeed, the Accounts 1561, where 7  $\frac{3}{4}$  *Lispunds* are reckoned to the *Barrel*, charges the same total Number of *Barrels* received, and no more than the after Accounts, where 15 are computed, though, according to the first Rate of Computation, the loose *Lispunds* must have filled near twice as many *Barrels*, as by the second.

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To conclude, the Tendency of the present Process, is to deprive the Defender of three Fifths of those Rents, which he and his Ancestors have possessed, without Interruption, ever since the 1707, and which have been levied to as great an Extent as at present, for at least 150 Years backwards. If the Pursuers were to prevail in this Plea, they would render those Revenues, which in the 1643 were considered as sufficient to answer the Interest of 30,000 *l.* at 8 *per cent.* unequal to the Interest of half that Sum at 5 *per cent.*

Although in a Process of this kind, it was not necessary, that the Defender should bring any Proof at all, whilst, on the other hand, it was incumbent upon the Pursuers, to bring the clearest and most indisputable Evidence of every Branch of their Libel, yet the Defender apprehends, that the Proofs upon his Part are clear and convincing, whilst the Pursuers have entirely failed in theirs.

That the Standard-weights of this Country have been regularly committed to the Custody of Persons named by the Gentlemen of the Country, and of late by the Magistrates of *Kirkwall*, is beyond Dispute, from the Evidence which has now been stated; the Standard-weights themselves, now in Court, are proved to have been the same which were delivered over by Order of the Country Gentlemen to the Assayer, by them appointed, in the 1686; and, from the Abstract of the Acts of their County-meetings, it is evident, that the Uniformity of the Weights was the constant Object of their Attention. It is further proved, that a higher Tack-duty was for several Years paid by *William Dick*, for the Crown-rents of these Islands, 130 Years ago, than the Crown-rents at present yield to the Defender, and the Prices which the same nominal Weight is proved to have yielded in the Beginning of the last Century, are fully as high, as the same nominal Weight does yield at this Day, though, as the Pursuers affirm, it now weighs near double. And the Defender has further produced an unanswerable negative Proof against the Pursuers Alledgeance, from the Records during that Period, when the first great Increase is said to have happened; for in these Records, though numberless Complaints are found against the two Earls of *Orkney*, yet no Insinuation of any Attempt made by them to increase the Weights.

On the other hand, the Pursuers Averments, in Support of their Libel, and the Proofs they have brought, are contradictory; they have proved to your Lordships, That for 110 Years, from the 1600 downwards, 10 *Lispunds* were allowed to the Barrel, although in that Period they affirm that the *Lispund* returned from 18 to 16 Pounds, and remounted to 18 again. If the Number of *Lispunds* allowed



allowed to a Barrel had, as the Pursuers pretend, always answered to the Number required to fill a Barrel, then it is impossible, that 10 *Lispunds* of 16 Pounds, and 10 *Lispunds* of 18 Pounds, could each of them have exactly answered to the Contents of the same Barrel. The Pursuers affirm, that from the 1710, the *Lispund* has increased from 18 to 28 or 30 Pounds, yet this extraordinary Increase, though happening within the Memory of many who are now alive, has passed unobserved by them, and without the least Complaint or Suspicion till the 1733, when a Quarrel between Sir *James Stuart* and the Defender's Factor opened Sir *James's* Eyes to this Enormity, and from him the Pursuers caught the Inspiration. The Pursuers favourite Witness, Mr. *Traill* of *Hobister*, who became Chamberlain in the 1712, and the Course of whose Business naturally led him to observe any Increase, even the most minute, if it had really happened, yet when put to answer this precise and unambiguous Question, "Whether or not upon his Conscience, and the great and solemn Oath he had taken, he believed or knew, that before the Year 1743, for several Years then past, the Weights of *Pundars* and *Bysmars*, were greatly increased and overgrown? Deponed in Answer to the above Interrogatory, That, by the Oath he had made, he adhered to his above Oath, and that the *Pundars* and *Bysmars* before the 1743 were most fallacious and unjust." Your Lordships will easily perceive, by reading what immediately preceeds this Part of his Oath, that his Answer does not correspond to the Question, and that it was evidently the Result of a Struggle between the Conscientiousness of Truth, and his Desire to serve a Party; but however strong the Influence of his Inclination, yet he dared not to say, he believed in his Conscience, that the Weights had increased within his Memory.

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It is therefore impossible to believe, that the Weights have increased since the 1710. The Pursuers themselves in effect acknowledge, that they were not increased during 110 Years immediately preceeding that Æra: And, with regard to their Proof, that an Increase happened towards the End of the 16th Century, these have been shown to be altogether frivolous, depending entirely upon the contradictory and conjectural Computations, which are found in the Accounts of Thirds of Benefices.

From the whole View of the Case, the Defender has no Apprehension with regard to the Event of this Cause; whether the Pursuers have any Excuse for the Liberties they have every where taken in their Memorial, must be left to your Lordships Determination.

*In respect whereof, &c.*

WILLIAM JOHNSTONE.

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**EXTRACT, Commission by the Lords of secret Council, to the Bishop of Orkney and others, anent Zetland.**

**A**PUD Halvudhous, decimo Maii, millesimo sexcentesimo vigesimo, sederunt, Chancellor, Wynthoun, Bugcleugh, Melros, Lauderdaill, Kildrymmie, Kilsythe, Brunteland, Innerteill, Reidhous, Curryhill, Advocate, Merchinstoun, Mr. P. Rollock, Conservatour: FORASMEIKLE as Information has bein maid to the Lordis of secret Counsaill, of mony greit Abuses, Insolencys and Offenses, very frequentlie committit within the Boundis of Zetland, upon the poore Inhabitantis thair of, pairtlie under the Pretext and Cullour of Law and Justice, and pairtlie by the Connivence, Oversight, Toleration and Allowance of these who are trusted with the Offices of Judicatorie and Jurisdiction within the same Boundis, to whose Charge and Duty the Reparation, Redres, Punischeing and Suppressing of such Abuses, Insolencys and Offenses properlie apperteyned; as namelie, that the poore People and Kyndlie Tennentis and Possessouris of the Land ar violentlie ejectit of thair Kindlie-rowmes without Form or Order of Law; that the Weightis and Measouris of the Countrey quhairwith the poore anes payes thair Fermes and Dewties, ar yearly alterit and changit, without Warrant, and agains the Forme prescryeit be the last Act of Parliament; that Theives apprehendit and committit to Ward for Thift ar put to Libertie without Tryal; and nevertheles thair Landis and Goodis secretlie confiscat and seased upoun, as gyf a lauchful Conviction and Doome were pronounced agains them; that the Lordis Sabbothe is prophaned and broken with unnecessarie and untimous Carriages, under a fals pretext and Cullour that it is done for the Kingis Service: that the Impositionis and Burdyenes raised and layd upoun the Countrey be the lait Erle of Orkney, and most worthelie dischargeit be the Kingis Majestie and his Commissionaris, ar now exactit and upliftit with greitar Rigour, nor at ony Tyme preceeding; that notour Adulteris, Incestis, and uthers filthie Crymis of that Kynd ar tollerat and oversene; that all Sorts of Sine and Vyce is not only oversene without Punishment, bot excuseit, maintainit and borne oute, and the Ministeris, reproving and finding fault thairwith, mockit and scornit in thair Faces quhen thay ar in the Pulpit; to the greit Offence of



of God and Scandall of his holy Ministrie; that the Rentis and Dewties accustomit to be payit of auld to the Deanis, ar now not onlie augmentit and upliftit with greater Rigour and Extremitie nor at ony Tyme heirtofair, bot thay ar sufferit, assisted and enboldenet to encroach upoun the Propertie of the Land in fundrie Pairts of the Countrey, to the Prejudice of the Freedom and Libertie of the Countrey; besydis a Number of uther Insolencys, Oppressiouns and Wrongis, outhir committit directlie be his Majestie's saidis Officiaris, at the least tollerate and oversene be thame, and no Wayes tane Ordour with and punisshit, and the saidis Lordis being cairful, *as it becometh thame to understand the certane Truth of thir Matteris, and fra whome the saidis Abuses, Insolencyes and Disordouris, and the Ground, and Caus and Occasioun of the same doth proceed*, seeing it is a Matter most unworthie in the Persons of those bearing Office and Charge under his Majestie to be truely twichted with such heigh Poynts of Neglect of Dewtie. THEREFORE the saidis Lordis has given and grantit, and be the Tenour heirof gives and grantis full Power and Commissioun be thir Presents to the Reverend Father in God George Bischop of Orkney, and to Sir Johnne Buchanan, Knight, and William Bruce of Symbester, to resorte and repair to the Boundis of Yetland, *and there to try and informe thameselfis trewlie and sufficientlie concerning the saidis Abuses, Insolencyes, Disordours and Offences, and fra whome the Ground and Occasioun of the same hes and doth proceed*; And what hes bein the Behaviour and Carriage of the Sheriff-depute, his Clarkis and Officiaris thairintill, and yf thay have been accessorie thairinto, or Connivaris, Overfiaris, and Tolleratouris of the same; and to tak Cognitioun thairintill, after such Forme and Manner as thay fall think most fitt and expedyent for giving unto thame ane trew and perfyte Light and Informatioun thairanent; ferme and stable Halding, and for to hald all and qhatsumever Thingis fall be lauchfullie done herein; *and that the saids Commissionaris mak a Report in Wreit under thair Hands* of thair Proceedingis in this Commissioun, with all convenient Diligence, after thay have execute the same, to the saidis Lordis of his Majesties Privy Counsaill, to the Effect thay may tak such forder Ordour thairintill as thay fall think expedyent. Extracted from the Records of Privy-council in the Lower Parliament-house, upon this and the two preceeding Pages, by Mr. Thomas Gibsone, one of the principal Clerks of Session, as having Commission for that Effect from the Lord Clerk Register.

(Signed) Tho. Gibsone.



